

No. 99.

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UNITED STATES CIRCUIT COURT OF APPEALS,  
FOR THE NINTH CIRCUIT.

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PACIFIC MUTUAL LIFE INSURANCE  
COMPANY,

*Plaintiff in Error,*

VS.

CORA E. NIXON,

*Defendant in Error.*

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*Error to the Circuit Court of the United States, for District  
of Washington, Western Division.*

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*In the Circuit Court of the United States, for the District  
of Washington, Western Division.*

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**Judgment Roll, No. 127.**

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY,

*Defendant.*

*In the Circuit Court of the United States, for the District  
of Washington, Western Division.*

*July Term, 1892.*

Be It Remembered :

That on the 11th day of February, 1892, there was  
duly filed in the said Circuit Court of the United States  
for the District of Washington, Western Division, a  
Complaint, in words and figures as follows, to-wit :

*In the Circuit Court of the United States for the West-  
ern District of Washington, Holding Terms at  
Tacoma.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY,

*Defendant.*

The plaintiff herein for her cause of action alleges :

## I.

That at all times mentioned in this complaint she was and is a resident and citizen of the State of Washington.

## II.

That heretofore, on the 1st day of September, 1889, and at all times, the defendant was a citizen of the State of California, being then and there a corporation, duly organized and incorporated by the said State of California under the laws thereof, and at all times mentioned in this complaint was doing business in the State of Washington, with an office at Tacoma, in said State. That on the said 1st day of September, 1889, one Thomas Lee Nixon was the husband of the plaintiff herein, and was such until his death. That on said first day of September, 1889, the defendant and said Thomas Lee Nixon entered into a certain mutual written agreement and contract, commonly known and called a life insurance policy, by the terms of which said policy the defendant then and there agreed and undertook in consideration of the sum of five hundred and seventeen eighty one-hundredths dollars, which was then and there duly paid by said Thomas Lee Nixon to insure his life for the term of twenty years, and in the event of his death to pay this plaintiff, the wife of said Thomas Lee Nixon, the sum of ten thousand dollars.

## III.

That on the said 1st day of September, 1889, said Thomas Lee Nixon paid in cash to said defendant the sum of five hundred seventeen eighty one-hundredths dollars in full of the premium so agreed to be paid, and



said policy was then and there delivered in the City of Tacoma, Washington, to the said Thomas Lee Nixon.

#### IV.

That on the 31st day of October, 1890, this plaintiff, then the wife and now the widow of said Thomas Lee Nixon, upon the special written instance and request of the defendant and its agents, paid the second annual premium in cash, to-wit: the sum of five hundred and seventeen eighty one-hundredths dollars, which payment was duly received by defendant and its agent, and duly receipted for in writing, a copy of which receipt is in words and figures following, to wit:

“ \$517.80.                      PORTLAND, Oregon, Oct. 31, 1890.

Received of Ladd & Tilton, bankers, \$517.80 for account of Thomas L. Nixon policy, as per telegraphic instructions from Merchant's National Bank, Tacoma. 10/ 31, 1890.

EDWARD C. FROST, Agent.

#### V.

That on the 31st day of October, 1890, the said Edward C. Frost, who signed said receipt and received said premium was the general agent of the defendant, residing at Portland, Oregon.

#### VI.

That on the 16th day of April, 1891, the said Thomas Lee Nixon died; of which fact due notice and proof was made upon defendant, and demand was then and there made for payment of the sum so agreed to be paid in said policy of insurance, and that this plaintiff was the sole

beneficiary under said policy, and was entitled to the said sum of ten thousand dollars, for which the life of said Thomas Lee Nixon was insured.

#### VII.

But this plaintiff alleges that notwithstanding the express written agreement, stipulation and promises so made by the defendant, in said policy of insurance, to insure the life of said Thomas Lee Nixon, and to pay upon proof of his death said sum to this plaintiff said defendant, though often requested so to do, has refused and still refuses to pay said sum to the plaintiff.

#### VIII.

And the plaintiff further alleges that all the terms and conditions of said contract of insurance have been fully complied with, as she is advised, and that any breach of said contract, if any, has been made and caused by the wrongful acts of defendant and his agents.

#### IX.

Wherefore, plaintiff prays for judgment for the sum of ten thousand dollars, and the pro rata amount of the last premium paid upon said policy and for interest and costs.

PALMER & PALMER,  
CARROLL & CARROLL,

Att'ys for Plaintiff.

STATE OF WASHINGTON, }  
County of Pierce. } ss.

I, Cora E. Nixon, do solemnly swear that I am the plaintiff in the above entitled action, and that the statements in the foregoing complaint are true as I verily believe.

CORA E. NIXON.

Subscribed and sworn to before me, this 11th day of Dec., 1891.

[Seal.]

FRANK S. CARROLL, Notary Public,  
Residing at Tacoma, Wash.

Endorsement:

Filed this 11th day of February, A. D. 1892.

A. REEVES AYRES,  
Clerk.

And afterwards, to-wit: on the 21st day of March, 1892, there was duly filed in said Court in said cause, an answer to the complaint in the words and figures as follows, to-wit:

*In the United States Circuit Court, Ninth Judicial Circuit for the District of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

vs.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA  
(a corporation),

*Defendant.*

No. 127.

Now comes the above named defendant, and answering unto the complaint of plaintiff filed herein, admits, denies, avers and alleges as follows:

1. Admits that on the first day of September, 1889, and at all times since then, this defendant was a citizen of the State of California, a corporation organized and existing under the laws of the State of California, and avers that its true corporate name is the Pacific Mutual Life Insurance Company of California;

Alleges that its home office and principal office and place of business was and is at the City and County of San Francisco, in the State of California;

Admits that at and during all said time it has been and is doing business in the State of Washington, with an agency and agency office at Tacoma in said State.

2. Admits that on the first day of September, 1889, one Thomas Lee Nixon was the husband of the plaintiff in this cause, and continued to be such until the date of his death.

3. Admits that on said first day of September, 1889, this defendant and the said Thomas Lee Nixon entered into a certain mutual agreement and contract commonly known and called a life insurance policy; but

4. Denies that the terms of said policy and contract, or policy or contract are correctly or fully stated or set out in the complaint filed herein, or that the true or full consideration for said policy of insurance is set out or stated in the said complaint.

5. Alleges that the said written contract of insurance was in two parts, one of which is commonly known as and called an "application for life insurance," and which consisted of an instrument having on the face thereof divers questions propounded on behalf this defendant to the said Thomas Lee Nixon, with his answers thereto written thereon, and also of divers agreements, covenants and warranties made by and on the part of said Thomas Lee Nixon, which said instrument was dated at Tacoma on the 15th day of August, 1889, and was signed by the said Thomas Lee Nixon, and constituted and became and was by the terms thereof and of the other part of said

contract, to-wit: the policy, a part of the contract of insurance between the said Thomas Lee Nixon and this defendant.

6. Avers that among the questions so propounded to and answered by the said Thomas Lee Nixon was the following:

“ Do you understand and agree that only the officers  
“ at the home office have authority to determine whether  
“ or not a policy shall issue on any application, and that  
“ they act only on the statements and representations in  
“ the application, and that no statements, representations  
“ or information made or given by or to the person solicit-  
“ ing or taking this application for a policy, or to any  
“ other person, shall be binding on the Company, or in  
“ any manner affect the rights, unless such statements,  
“ representations or information be reduced to writing,  
“ and presented to the officers of the Company at the  
home office in this application?” To which question the  
said Thomas Lee Nixon answered “ Yes.”

Avers that among the covenants, agreements and warranties contained in the said instrument and signed by the said Thomas Lee Nixon was the following, to-wit:

“ It is hereby declared and warranted that all the  
“ statements and answers made in this application,  
“ including the answers to questions to be asked by agent  
“ and the questions to be asked by the Medical Examiner  
“ are complete and true, and that they, together with  
“ this declaratian and agreement, constitute an appli-  
“ cation to the Pacific Mutual Life Insurance Company  
“ of California, for a policy of insurance, and are offered  
“ as a consideration for the policy hereby applied for.”

“ And it is agreed that there shall be no contract of  
“ insurance until a policy shall have been issued and  
“ delivered by the said company and the first premium  
“ thereon paid while the person proposed for insurance is  
“ living, and in the same condition of health described  
“ in this application ; and that if said policy be issued,  
“ the declarations, agreements and warranties herein con-  
“ tained shall constitute a part of the contract, and the  
“ contract of insurance when made, shall be held and  
“ construed at all times and places to have been made in  
“ the City of San Francisco, in the State of California.”

Also the following : “ It is agreed that the policy  
“ issued upon this application shall become null and void  
“ if the premium thereon is not paid as provided therein;  
“ and should such policy become null and void by reason  
“ of the non-payment of premium, all payments previously  
“ made shall be forfeited to the Company, except as  
“ therein otherwise provided.”

Which application, containing the question and the covenants, agreements and warranties hereinbefore quoted, was duly signed by the said Thomas Lee Nixon, and by him delivered to this defendant as a part of the said contract of insurance, and in consideration thereof, and as an inducement to this defendant to issue its policy upon his life ; which application so signed, executed and delivered to this defendant, this defendant is ready and willing and now offers to produce as this Court shall direct.

7. Alleges that afterwards and on the first day of September, 1889, this defendant did, “ in consideration  
“ of the representations made ” in the application there-  
“ for, and of the agreements therein contained, which

“ application is made a part of this contract, and of the  
“ sum of five hundred and seventeen dollars and 80 cents,  
“ and of the annual payment of a like amount to be paid  
“ on or before twelve o'clock noon of the first day of  
“ September in every year during the continuance of this  
“ policy,” insure the life of Thomas Lee Nixon for the  
sum of ten thousand (\$10,000.00) dollars for the period  
of twenty years, and did promise and agree “ to pay the  
“ amount of the said insurance at its office in the City of  
“ San Francisco, to Thomas Lee Nixon or assigns, on the  
“ first day of September, 1909, or should the person  
“ whose life is hereby insured, die previous to the date  
“ last mentioned, leaving this policy unassigned, the said  
“ amount shall be payable upon due notice and satis-  
“ factory proof of the death of said insured, to Cora E.  
“ Nixon, wife of said Thomas Lee Nixon,” the plaintiff  
in this cause.

8. Defendant further alleges that in and by the said policy and printed on the face thereof, it was further provided “that after the payment of the first premium  
“ thereon, a grace of thirty days for the payment of  
“ premium shall be allowed, but only in case the same is  
“ paid during the lifetime of the insured aforesaid;” and in and by the said policy of insurance and printed on the face thereof, it was further provided “that no alteration  
“ or waiver of the conditions of this policy shall be valid  
“ unless made in writing at the office of said Company  
“ in San Francisco, and signed by the President, or  
“ Vice-President and Secretary or Assistant Secretary.”

Which policy of insurance constituted the second part to the mutual contract so made by and between this

defendant and the said Thomas Lee Nixon, and was by this defendant delivered to the said Thomas Lee Nixon, and was, and is, as this defendant is informed and believes now in the possession of the plaintiff in this cause; and this defendant demands that upon the trial of this cause, the same shall be produced for the examination and inspection of this Court as the Court shall direct.

9. Admits that upon the delivery of said policy of insurance, the first premium therein mentioned, to-wit: The sum of \$517.80 was duly paid by the said Thomas Lee Nixon.

10. Denies that all the terms and conditions of said contract of insurance have been fully complied with by the said Thomas Lee Nixon, and denies that any breach of said contract has been made or caused by the act or acts of this defendant or its agents.

11. Alleges that the second annual premium falling due under said policy, to-wit: The premium falling due on the first day of September, 1890, was never paid, nor was any part thereof ever paid, neither on the said first day of September, 1890, or at any other time, nor was the same tendered at any time within thirty days next after the said first day of September, 1890, as in the said policy provided; by reason whereof the said policy became and was, and ever since the thirtieth day of September, 1890, has been null and void.

12. Denies that the payment alleged to have been made on the 31st day of October, 1890, was made at the special written instance and request, or at the instance and request of this defendant or its agents, or that the same was ever accepted or received by this defendant



or by any agent of this defendant, as payment of the premium aforesaid; on the contrary this defendant ALLEGES the truth and the fact to be that the said policy of insurance was at that time and ever since the 30th day of September next prior to that time has been null and void; but, under the rules and practice of this defendant in the conduct of its business of insurance, it was the custom of this company to permit an insured whose policy had been forfeited for non-payment of premium to have the same restored at any time within sixty days after such forfeiture upon a written application for such restoration, accompanied with a certificate from an examining physician showing that the applicant was still in good health, and upon payment of premium then past due; that the agent of this defendant had advised the said Thomas Lee Nixon of this custom, and informed him that his policy might be restored upon such written application, with certificate of health and payment of premium, and suggested to him that he make such application and furnish a certificate of examination and of good health, and deposit the same with him, the agent, when he, the agent, would forward such application and certificate to the home office for its action; but that he, the agent, had no power or authority to restore said policy under any circumstances or to apply any money that might be received by him after the 30th day of September, 1890, to the payment of premium upon said policy; that the said sum of \$517.80, so received by Edward C. Frost, the agent of the defendant at Portland, Oregon, from Ladd & Tilton, Bankers, on the 31st day of October,

1890, as shown by the receipt (a purported copy of which is set out in the said complaint) was not received by said agent in payment of said premium, and the said agent had no power or authority to receive the same in payment of said premium, but it was simply received by him to be applied in payment thereof in case said policy should be restored; and he, the said agent, immediately notified the plaintiff herein of such fact, and that it would be necessary to forward to the home office an application for restoration of the policy, together with a certificate of examination and good health, in order to secure such restoration; otherwise, that the money would be held in trust for her and subject to her order.

Alleges that neither the plaintiff nor the said Thomas Lee Nixon ever forwarded to the home office or to the said agent, or delivered to them or either of them, any application for restoration of said policy, or any certificate of examination or of good health, or ever took any steps to secure the restoration of said policy, and that no restoration thereof was ever made, or any premium receipt for the money so deposited with said agent ever given; but that the money so paid to said Frost was always held by him as the money of said plaintiff and subject to her order, and that she was, by the said Frost, so fully informed and advised long before the death of said Thomas Lee Nixon, and has since been and now is so informed and advised.

13. Admits that the said Thomas Lee Nixon died on the 16th day of April, 1891, but denies that the said plaintiff then became or was or at any time since has

been, or now is entitled to the said sum of ten thousand dollars, or any other sum, of or from this defendant for or on account of said policy of insurance aforesaid.

14. Admits that this defendant has refused and still refuses to pay the said sum or any sum to the plaintiff, and denies that the plaintiff is entitled to have or recover any sum of money whatever from this defendant.

Of all which the defendant prays judgment that it be hence dismissed with its costs.

DOOLITTLE & FOGG,

Attorneys for Defendant.

CHARLES N. FOX, of Counsel.

STATE OF CALIFORNIA, }  
 City and County of San Francisco. } ss.

I, George A. Moore, do solemnly swear that I am the President of the Pacific Mutual Life Insurance Company of California, the above named corporate defendant, and that the statements in the foregoing answer contained are true as I verily believe.

GEO. A. MOORE.

Subscribed and sworn to before me this 9th day of March, 1892.

(Seal)

THOMAS E. HAWEN,

Notary Public.

And, afterwards, to-wit; on the 9th day of September, 1892, there was duly filed in said Court in said cause a reply to defendant's answer to the complaint in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, for the State of  
Washington, Western Division, Holding  
Terms at Tacoma.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY,

*Defendant.*

} Reply.

Comes the plaintiff, and saving and reserving to herself all matter of exceptions to the errors, uncertainties and insufficiencies of defendant's answer herein, for replication unto said answer, alleges:—

I.

That she denies each and every allegation in said defendant's answer, not herein or in the complaint herein expressly admitted.

II.

She admits that she has in her possession the original contract for life insurance sued on, but disclaims any knowledge of any collateral agreement, stipulation or contract, which is alleged to be part of said contract of life insurance.

III.

She denies having any knowledge or information sufficient to form a belief as to the rules and customs of said defendant, alleged in Paragraph XII of said answer.

IV.

She denies that the receipt pleaded in her complaint

shows upon its face that it was not received in full payment of the premium due, and denies that it was received in trust for the benefit of this plaintiff by the said agent, Frost, as alleged in said XII paragraph of said complaint; but she alleges the truth to be that said agent, Frost, has repeatedly refused to return or account to this plaintiff for said sum of \$517.80 paid to agent Frost, as alleged in her complaint, and she moreover alleges that at all times said agent Frost has acted and represented said defendant as its agent and not otherwise.

Wherefore, plaintiff prays judgment as originally claimed in her said complaint.

CARROLL & PALMER,

Attorneys for Pltf.

STATE OF WASHINGTON, }  
County of Pierce. } ss.

I, Cora E. Nixon, having read the statements herein contained, do solemnly swear that the same are true as I verily believe.

CORA E. NIXON.

Subscribed and sworn to before me, this 3d day of Sept. A. D. 1892.

[Seal.]

GEO. L. PALMER,

Notary Public residing at Tacoma,

Pierce County, Washington.

And afterwards, to-wit: on Tuesday, the 13th day of September, 1892, the same being the sixteenth judicial day of the regular July term of said Court, present the Honorable Cornelius H. Hanford, United States District

Judge, presiding, the following proceedings were had in said cause, to-wit :

*United States Circuit Court, District of Washington,  
Western Division. July Term.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY,

*Defendant.*

Now, on this day, on the application of plaintiff's attorney, leave is given plaintiff to file an amended bill of complaint herein, and time was given the defendant until September 24th to file its answer thereto.

Dated September 13, 1892.

And afterwards, to-wit : on the 15th day of September, 1892, there was duly filed in said Court in said cause an amended complaint in the words and figures as follows, to-wit :

*In the Circuit Court of the United States for the District  
of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

*Defendant.*

Complaint.

Now comes the plaintiff, and by leave of Court, files

her amended complaint herein, and for cause of action against the defendant, says :

### I.

That on the 1st day of September, 1889, and for a long time prior thereto, she was, ever since has been, and still is a citizen of the State of Washington, residing in the City of Tacoma, in the County of Pierce, in said State.

### II.

That on said 1st day of September, 1889, and for a long time prior thereto, the defendant, the Pacific Mutual Life Insurance Company of California, was, ever since has been, and still is a citizen of the State of California it being then and there a corporation duly organized, incorporated and existing under and by virtue of the laws of said State of California, and having its principal place of business in the City of San Francisco, in said State, and during all of said time legally authorized to do, and doing business in the State of Washington as a life insurance company, engaged in the business of life insurance.

### III.

That on said first day of September, 1889, and for a long time prior thereto, and since said time until the date of his death, one Thomas Lee Nixon was the lawful husband of this plaintiff.

### IV.

That on said first day of September, 1889, the defendant and said Thomas Lee Nixon entered into a contract in writing, wherein and whereby the said defendant promised, agreed and bound itself in consideration of the

representations made to it by said Thomas Lee Nixon in his application to said defendant therefor, and the payment by said Thomas Lee Nixon to said defendant of the sum of five hundred and seventeen and eighty-hundredths (\$517.80) dollars on said first day of September, 1889, and of the annual payment of a like amount on or before twelve o'clock noon of the first day of September in every year during the continuance of said contract, to insure, and by the express terms of said contract, the defendant did insure the life of said Thomas Lea Nixon, in the full sum and amount of ten thousand dollars for the term of twenty years from said date. And in and by the terms of said contract and for said consideration, said defendant promised and agreed to pay the amount of said insurance, to-wit: Said sum of ten thousand dollars, at its office in the City of San Francisco, to said Thomas Lea Nixon or his assigns, on the first day of September, 1909, or if said Thomas Lea Nixon should die previous to said last mentioned date, leaving said policy of insurance unassigned, then in that event, said defendant promised, upon due notice and satisfactory proof of the death of said Thomas Lea Nixon, to pay the amount of said insurance, to-wit: Ten thousand dollars to Cora E. Nixon, wife of said Thomas Lea Nixon, this plaintiff.

## V.

That said Thomas Lea Nixon, on said first day of September, 1889, paid to said defendant the first premium due upon said contract of insurance, to-wit: The sum of five hundred and seventeen and 80-100 dollars, and said defendant accepted the same and duly issued its



policy of insurance, insuring the life of said Thomas Lea Nixon in the sum of ten thousand dollars, payable as aforesaid, and delivered said policy to said Thomas Lea Nixon.

That thereafter, and until the time of his death, said Thomas Lea Nixon faithfully kept and performed all of the conditions in said contract to be kept and performed by him.

#### VI.

That on the 16th day of April, 1891, and while said policy of insurance was in full force, said Thomas Lea Nixon departed this life without having assigned or disposed of said policy of insurance, leaving this plaintiff surviving him, as his widow and sole beneficiary under said policy of insurance, of all of which the said defendant has had due notice and full knowledge.

#### VII.

That upon the death of said Thomas Lea Nixon and within a reasonable time thereafter, this plaintiff, as the widow of said Thomas Lea Nixon and sole beneficiary under said policy of insurance, and after said defendant had due notice and full knowledge of the death of said insured, demanded of the defendant the payment to her of said sum of ten thousand dollars, as provided in said policy, but to pay the same or any part thereof, the defendant then refused and still doth refuse.

Wherefore, plaintiff prays judgment against said defendant for said sum of ten thousand dollars, with interest thereon at the rate of ten per cent per annum

from the 16th day of April, 1891, and for the reasonable costs and disbursements herein.

P. H. PALMER,  
THOS. CARROLL, and  
RELFE & BRINKER,  
Attorneys for Plaintiff.

STATE OF WASHINGTON, }  
County of Pierce. } ss.

Cora E. Nixon, being first duly sworn, on oath deposes and says, that she is the plaintiff named in the foregoing complaint; that she has read said complaint, knows the contents thereof, and believes the same to be true.

CORA E. NIXON.

Subscribed and sworn to before me this 14th day of September, 1892.

(Notarial Seal.)

THOS. CARROLL,  
Notary Public in and for the State of  
Washington, residing at Tacoma.

And afterwards, to-wit: On the 24th day of Sept., 1892, there was duly filed in said Court in said cause, an answer to the amended complaint in the words and figures as follows, to-wit:

*In the United States Circuit Court, Ninth Judicial Circuit  
for the District of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA, (a corpor-  
ation),

*Defendant.*

No. 127.

Now comes the above named defendant and answering

unto the amended complaint, filed herein, admits, denies, avers and alleges, as follows:

1. Admits that on the first day of September, 1889, and at all times since then, this defendant was a citizen of the State of California a corporation organized and existing under the laws of the State of California, and avers that its true corporate name is The Pacific Mutual Life Insurance Company of California.

Alleges that its home office and principal office and place of business, was, and is at the City and County of San Francisco, in the State of California.

Admits that at and during all of said time, it has been and is doing business in the State of Washington, with an agency and agency office at Tacoma, in said State.

2. Admits that on the first day of September, 1889, one Thomas Lea Nixon was the husband of the plaintiff in this cause, and continued to be such until the day of his death.

3. Admits that on said first day of September, 1889, this defendant and the said Thomas Lea Nixon entered into a certain contract in writing, which is commonly known and called a life insurance policy; but

4. Denies that the terms of said policy and contract or policy or contract are correctly or fully stated or set out in the amended complaint filed herein, or that the true or full consideration for said policy of insurance is set out or stated in the said amended complaint.

5. Alleges that the said written contract of insurance was in two parts one of which is commonly known as and called an "application for life insurance," and

which consisted of an instrument] having on the face thereof diverse questions propounded on behalf of this defendant to the said Thomas Lea Nixon with his answers thereto written thereon, and also of diverse agreements, covenants and warranties made by and on the part of said Thomas Lea Nixon, which said instrument was dated at Tacoma on the 15th day of August, 1889, and was signed by the said Thomas Lea Nixon; and constituted and became, and was by the terms thereof and of the other part of said contract, to-wit: the policy a part of the contract of insurance between the said Thomas Lea Nixon and this defendant.

6. Avers that among the questions so propounded to and answered by the said Thomas Lea Nixon was the following:

“ Do you understand and agree that only the officers  
“ at the Home Office have authority to determine  
“ whether or not a policy shall issue on any application,  
“ and that they act only on the statements and repre-  
“ sentations in the application, and that no statements,  
“ representations or information made or given by or to  
“ the person soliciting or taking the application for a pol-  
“ icy, or to any other person, shall be binding on the com-  
“ pany, or in any manner affects its rights, unless such  
“ statements, representations or information be reduced  
“ to writing, and presented to the officers of the company  
“ at the home office in this application,” to which ques-  
tion the said Thomas Lea Nixon answered “yes.”

Avers that among the covenants, agreements and warranties contained in the said instrument and signed by the said Thomas Lea Nixon was the following, to-wit:

“ It is hereby declared and warranted that all the  
“ statements and answers made in this application, in-  
“ cluding the answers to questions to be asked by agent  
“ and the questions to be asked by the medical examiner,  
“ are complete and true and that they, together with this  
“ declaration and agreement, constitute an application to  
“ the Pacific Mutual Life Insurance Company of Cali-  
“ fornia, for a policy of insurance, and are offered as a  
“ consideration for the policy hereby applied for. And  
“ it is agreed that there shall be no contract of insurance  
“ until a policy shall have been issued and delivered by  
“ the said company, and the first premium thereon paid  
“ while the person proposed for insurance is living and in  
“ the same condition of health described in this applica-  
“ tion; and that if said policy be issued, the declarations,  
“ agreements and warranties herein contained shall con-  
“ stitute a part of the contract, and the contract of in-  
“ surance when made, shall be held and constituted at all  
“ times and places to have been made in the City of San  
“ Francisco, in the State of California.”

Also the following: “It is agreed that the policy is-  
“ sued upon this application shall become null and void if  
“ the premium thereon is not paid as provided therein,  
“ and should such policy become null and void by reason  
“ of the non-payment of premium, all payments pre-  
“ viously made shall be forfeited to the company, except  
“ as therein otherwise provided.”

Which application, containing the question and the  
covenants, agreements and warranties hereinbefore  
quoted, was duly signed by the said Thomas Lea Nixon,  
and by him delivered to this defendant as a part of the

said contract of insurance, and in consideration thereof, and as inducement to this defendant to issue the policy of insurance upon his life, which application, so signed, executed and delivered to this defendant, this defendant is ready and willing and now offers to produce as this Court shall direct.

7. Alleges that afterwards and on the first day of September, 1889, this defendant did, "in consideration of the representations made x x" in the application therefor, and of the agreements therein contained, which "application is made a part of this contract, and of the "sum of five hundred and seventeen dollars and 80 cents, "and of the annual payment of a like amount, to be paid "on or before twelve o'clock noon of the first day of "September in every year during the continuance of this "policy," insure the life of Thomas Lea Nixon for the sum of ten thousand (\$10,000) dollars for the period of twenty years, and did promise and agree "to pay the "amount of the said insurance at its office in the City of "San Francisco to Thomas Lea Nixon or assigns on the "first day of September, 1909; or should the person whose "life is hereby insured die previous to the date last mentioned, leaving this policy unassigned, the said amount "shall be payable, upon due notice and satisfactory proof "of the death of said insured, to Cora E. Nixon, wife of "said Thomas Lea Nixon," the plaintiff in this cause.

8. Defendant further alleges that in and by the said policy and printed on the face thereof, it was further provided "that after the payment of the first premium "thereon a grace of thirty days for the payment of pre- "mium shall be allowed, but only in case the same is

“ paid during the lifetime of the insured aforesaid;” and in and by the said policy of insurance and printed on the face thereof it was further provided “ that no alteration “ or waiver of the conditions of this policy shall be valid “ unless made in writing at the office of said company in “ San Francisco, and signed by the President or Vice- “ President and Secretary or Assistant Secretary.”

Which policy of insurance constituted the second part to the contract so made by and between this defendant and the said Thomas Lea Nixon, and was by this defendant delivered to the said Thomas Lea Nixon, and was and is, as this defendant is informed and believes, now in the possession of the plaintiff in this cause; and this defendant demands that, upon the trial of this cause, the same shall be produced for the examination and inspection of this Court as the Court shall direct.

9. Admits that upon the delivery of said policy of insurance the first premium therein mentioned, to-wit: the sum of \$517.80, was duly paid by the said Thomas Lea Nixon.

10. Denies that all the terms and conditions of said contract of insurance have been fully complied with by the said Thomas Lea Nixon.

11. Alleges that the second annual premium falling due under this policy, to-wit: the premium falling due on the first day of September, 1890, was never paid, nor was any part thereof ever paid, either on the said first day of September, 1890, or at any other time, nor was the same tendered at any time within thirty days next after the said first day of September, 1890, as in the said policy

provided, by reason whereof the said policy became and was and ever since the thirtieth day of September, 1890, has been null and void.

12. Admits that the said Thomas Lea Nixon died on the 16th day of April, 1891, but denies that he died while the said policy was in force, and avers that by reason of the breach of said contract of insurance by and on the part of said Thomas Lea Nixon and the non-payment of said second annual premium the said policy was on, and long before the said 16th day of April, 1891, null and void; and denies that the said plaintiff then became, or was at any time since, has been or now is entitled to the said sum of ten thousand dollars, or any other sum, of or from this defendant for or on account of said policy of insurance aforesaid.

13. Admits that this defendant has refused and still refuses to pay the said sum or any sum to the plaintiff, and denies that the plaintiff is entitled to have or receive any money whatever from this defendant.

Of all which the defendant prays judgment that it be hence dismissed with its costs.

DOOLITTLE and FOGG,  
Attorneys for Defendant.

CHAS. N. FOX, of Counsel.

STATE OF CALIFORNIA, }  
City and County of San Francisco. } ss.

I, Charles N. Fox, do solemnly swear that I am an elective officer, to-wit: one of the directors of the Pacific Mutual Life Insurance Company of California, the above



named corporate defendant, and that the statements in the foregoing answer contained are true as I verily believe; and that there is no other elective officer of said defendant in this State; that the facts of this case are as fully known to me as to any elective officer of said defendant, and that I make this verification for and on behalf of said defendant.

CHAS. N. FOX.

Subscribed and sworn to before me, this 21st day of September, A. D. 1892.

[Seal.]

CHARLES S. FOGG,

Notary Public in and for the State of Washington,  
Residing at Tacoma, in said State.

And afterwards, to wit: on the 27th day of September, 1892, there was duly filed in said Court in said cause a motion to strike out parts of the amended answer, in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, for the District  
of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

*Defendant.*

No. 127.

Comes now the plaintiff in the above entitled cause by her attorney, and moves the Court to strike out and from the answer to the amended complaint, filed herein, all of paragraphs 5 and 6 thereof; for the reasons and upon the ground that all the matter contained in said para-

graphs is irrelevant, redundant, and immaterial to the issues in this case.

THOMAS CARROLL,  
LEROY A. PALMER,  
Attorneys for Plaintiff.

RELFE & BRINKER,  
Of Counsel.

Rec'd copy hereof at one fifteen o'clock, Sept. 27th, 1892.

DOOLITTLE & FOGG,  
Attys for Plff.

And afterwards, to-wit: on the 27th day of September, 1892, there was duly filed in said Court in said cause a reply to the amended answer in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, for the District of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

*Defendant.*

**Reply.**

Now comes the above named plaintiff, and for reply to the answer of defendant to the plaintiff's amended complaint, says:

I.

That she denies that within or at the period in said answer referred to, the said defendant had an office in

Tacoma or elsewhere in Pierce County in said State of Washington.

## II.

She denies that the premium falling due on the 1st day of September, 1890, with thirty days grace, was never paid and that no part thereof was ever paid at any time or tendered, as in paragraph II, of said answer contained; and denies that said policy at any time ever became null and void.

## III.

She denies that said policy was upon the 16th day of April, 1891, null and void, for the reasons or for any reasons alleged by defendant in paragraph 12 of its said answer.

Said plaintiff for further reply to the answer of defendant herein, says :—

## I.

That the said defendant company by its duly authorized agents, at the expiration of the thirty days grace following the first day of September, 1890, duly and fully waived the payment of the second annual premium, as to the time when such payment should be made by the terms of the said policy, and all other conditions therein; and extended the time of the payment thereof, as hereinafter stated, and specially authorized and requested the said Thomas L. Nixon to pay said second premium during the month of October, 1890; and did on or about said date, notify and declare to said Nixon that if said premium should be paid at any time during said month of October, the same would be accepted by said company as if paid in accordance with the terms of said policy.

## II.

That, in reliance upon and in pursuance of said request, extension and notification, the said Nixon, through this plaintiff thereupon immediately undertook to pay said second premium.

That defendant had no office or place of business in Pierce County, in which the insured then lived, and the local agent of defendant was then absent from said county and so remained absent till after said month of October.

That, after repeated efforts, being unable to find said agent or other person to whom said premium might be paid, up to the 31st day of October 1890, the same, to-wit: the sum of \$517.80, was on said date forwarded and paid to said company through one Edward C. Frost, the general agent residing at Portland, Oregon, who was duly authorized to receive the same as such, and the same duly applied to the payment of said premium, and that said defendant has ever since then kept and retained said sum of \$517.80 and does so now.

Wherefore, plaintiff says that defendant has waived all conditions in said policy with reference to the payment of said premium in any wise and all right or claim or forfeiture, if any it ever had, and is, and ought to be estopped from claiming any forfeiture under said policy.

For further reply plaintiff alleges:

## I.

That the defendant company was duly incorporated under the laws of the State of California and on the first day of September 1889, and ever since has been doing

the business of life insurance under such authorization and in such corporated capacity.

## II.

That heretofore, to-wit, on the——day of February, 1872, the Legislature of said State of California duly passed an Act entitled “An Act to regulate the forfeiture of policies of Life Insurance,” which was duly approved, and took effect on February 2nd, 1872, and that the same now is and ever since has been in full force and constitutes a part of the contract of insurance set forth in plaintiff’s amended complaint, which said Act was in the words following, to-wit:

Section 1. No policy of insurance on life hereafter issued by any company incorporated under the laws of this State shall be forfeited or become void by the non-payment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to-wit: the net value of the policy when the premium becomes due and is not paid shall be ascertained according to the American experience life-table rate of mortality, with interest at four and a half per centum per annum, or the same interest which has been assumed in finding the net value of the policy after deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premium, shall then be cancelled. Four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of

the party at the time of the lapse of premium and the assumption of mortality and interest aforesaid.

Sec. 2. If the death of the party occurs within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the payment of the premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; provided, however, that notice of the claim and proofs of death shall be submitted to the company within six months of the decease; and provided also that the company shall have the right to deduct from the amount insured in the policy the amount, at ten per centum per annum, of the premium that has been forborne at the time of the death.

Sec. 3. This act shall take effect immediately.

Wherefore, plaintiff having fully replied, prays judgment as in her amended complaint.

THOMAS CARROLL,  
LEROY A. PALMER,

Attorneys for Plaintiff.

RELFE & BRINKER,

Of Counsel.

STATE OF WASHINGTON, }  
County of Pierce. } ss.

Cora E. Nixon, being duly sworn on her oath, says that she is the plaintiff in the above entitled cause; that

she has read the foregoing reply, knows its contents, and believes the same to be true.

CORA E. NIXON.

Subscribed and sworn to before me this 27th day of September, 1892.

[Seal.]

GEO. L. PALMER,

Notary Public within and for the State of Washington, residing at Tacoma, in said county.

And afterwards, to wit: on the 28th day of September, 1892, there was duly filed in said Court, in said cause, a motion to strike out parts of the reply, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

vs.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

*Defendant.*

**Motion.**

Comes now the defendant and moves the Court to strike out of plaintiff's reply, filed herein, all that part thereof pleading or attempting to plead an alleged law of the State of California, for the reason that the same is not a proper part of said pleading, this Court taking judicial notice of the laws of the various States comprising the United States of America.

DOOLITTLE & FOGG,

Attorneys for Defendant.

And afterwards, to wit: on Tuesday, the 27th day of September, 1892, the same being the twenty-sixth judicial day of the regular July term of said Court, present the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

Twenty-sixth day.

TUESDAY, September 27, 1892.

Court met pursuant to adjournment, at 11 A. M., Hon. C. H. Hanford, U. S. District Judge on the Bench. Officers as of yesterday.

CORA E. NIXON,	<i>Plaintiff,</i>	}
<i>vs.</i>		
THE PACIFIC MUTUAL LIFE INSURANCE		}
COMPANY,	<i>Defendant.</i>	

### **Trial.**

Now, on this day this cause came regularly on for trial, Messrs. Carroll, Palmer & Relfe appearing for the plaintiff, Messrs. Doolittle & Fogg and Charles N. Fox appearing for the defendant, and a jury being called and duly answered to their names and were sworn, to wit: B. E. Haney, A. T. Patrick, O. Olson, H. Jordan, J. L. Huckins, S. J. Teachnor, J. E. Robinson, C. R. Plumb, D. G. Newell, Simon Hirsch, Eugene McCorkle, Geo. W. Cyphert; and said cause thereupon duly proceeded by hearing the evidence until the hour of adjournment, when by consent the jury were admonished by the Court and were allowed to separate till the incoming of Court to-morrow morning.



And, afterwards, to-wit: On the 28th day of September, 1892, there was duly filed in said Court in said cause, the instructions asked by the defendant to be given to the jury, in the words and figures as, follows, to-wit:

*In the United States Circuit Court, Ninth Judicial Circuit for the District of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

vs.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA, (a corpora-  
tion),

*Defendant.*

No. 127.

**Instructions to Jury.**

The defendant in this cause respectfully asks the Court to charge the jury as follows :

Given.

This is an action upon a contract of life insurance, and brought for the purpose of recovering the amount of the insurance named in the policy. The contract is in writing and upon its face shows that it is in two parts, to-wit: One part known as, and called Application for Life Insurance, and the other part being known as, and called a Policy of Life Insurance. There is no dispute in this cause as to the fact of a policy of life insurance having been issued and granted, insuring the life of Thomas Lea Nixon, in the sum of ten thousand dollars; nor is it disputed that said Thomas Lea Nixon died on the 16th day of April, 1891, and that his widow, the plaintiff in this cause, is entitled to recover the amount of the insurance,

provided the contract of insurance was in force at the date of his death.

Refused.

The application for insurance was written and signed in this State, and was made by said Thomas Lea Nixon, dated August 15th, 1889, and provided that the policy, if one should be issued thereon, should bear date on and run from the 1st day of September, 1889. This application was addressed to the defendant, The Pacific Mutual Life Insurance Company of California, a corporation organized and existing under the laws of the State of California, and having its principal place of business in San Francisco, in that State; and the application provided upon its face that if the proposition for life insurance therein contained should be accepted and a policy issued thereon, the contract of insurance should be held and construed at all times and places to have been made in the City of San Francisco, in the State of California. The application was accepted and the policy issued and made in San Francisco, in the State of California, and bore date September 1st, 1889, and by the terms of the contract itself became, and was a California contract, and the rights of the parties thereunder were governed by the terms of the contract and the laws of the State of California.

Given.

The contract further provides upon its face that if a policy should be issued upon the application, it should become null and void, if the premium thereon was not paid as provided therein, and should such policy become null and void by reason of the non-payment of the

premium, all payments previously made should be forfeited to the company, except as in the policy otherwise provided. This provision of the contract was, and is, expressly stated and declared in the first part thereof, to-wit: In the application made and signed by the insured, Thomas Lea Nixon.

Refused.

It was further provided in this application for insurance and became a part of the contract, that all the declarations, agreements and warranties therein contained should constitute a part of the contract, and that the application with its declarations, agreements and warranties was offered as a consideration for the policy applied for, the policy itself expressing on its face, that it was made in consideration of the representations made in the application therefor, and the agreements therein contained, which application is made a part of the contract, and of said sum of five hundred seventeen and 80-100, and the annual payment of a like amount to be paid on or before twelve o'clock noon, on the first day of September in every year during the continuance of the policy.

Given.

It was further provided in and upon the face of said policy that after the payment of the first premium, a grace of thirty days for the payment of the premium should be allowed, but only in case the same is paid during the life time of the insured aforesaid; also, that no alteration or waiver of the conditions of the policy should be valid unless made at the office of said company in San Francisco, and signed by the President or Vice-President, Secretary or Assistant Secretary.

Refused.

It is admitted that the contract of insurance was duly made and executed, containing all of the provisions here-inbefore stated. That the first premium thereon, was paid and the policy delivered, and the only issue in this case is, as to whether or not the second premium which fell due on the first day of September, 1890, was paid according to the terms of the policy, of contract.

Refused.

If you should find from the evidence that it was so paid, and that the insured, Thomas Lea Nixon, complied with the terms and conditions of the policy in that behalf on his part, then you will find for the plaintiff; but, on the other hand, if you find from the evidence that the premium which fell due on the first day of September, 1890, was not paid on or before twelve o'clock of that day, or within the thirty days grace, to-wit: The next succeeding thirty days thereafter, according to the terms of the policy, and within the lifetime of the insured, then it is your duty to find for the defendant.

Refused.

I charge you, that under the law of the contract, to-wit: the statutes and the laws of California, the provision made in this contract for prompt payment of the premium when due was a warranty that the premium should be so paid, and that a failure of this provision rendered the contract void under the statutes of California, as well as under the provisions of its own terms found on its face. This provision was one which the parties had a right to make, and having made it, it be-

came of the essence of the contract, and was binding upon the contracting parties and upon the beneficiary under the policy. The time within which the payment was to be made was also of the essence of the contract, and sickness or disability would not constitute an excuse for non-payment which operated to defeat the lapse of the policy, or prevent it becoming void for non-payment.

Refused.

If there was a failure to pay this premium within the time fixed by the contract, it defeats the plaintiff's right to recover in this action; the policy lapsed and became void by reason of that non-payment, and no promise of an agent to accept the premium after the time when it should have been so paid, would operate to renew the policy, even the act of a person holding an agency of this plaintiff, in receiving, receipting for and temporarily retaining the amount of the premium past due and for the non-payment of which the policy had lapsed by its own terms, would not operate as a waiver so as to renew the policy or entitle the plaintiff to recover thereon.

DOOLITTLE & FOGG,

Attorneys for Defendant.

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And afterwards, to-wit: on Wednesday, the 28th day of September, 1892, the same being the twenty-seventh judicial day of the regular July term of said Court, present the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Twenty-seventh Day.

WEDNESDAY, September 28th, 1892.

Court met pursuant to adjournment, at 10:30 A. M., Hon. C. H. Hanford, U. S. District Judge, on the bench, officers as of yesterday.

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY,

*Defendant.*

This cause again coming on regularly for hearing, the Jury being called duly answered to their names, and the cause thereupon duly proceeded by hearing the evidence and arguments of counsel till the close of the case, when the Jury being charged by the Court, retired to deliberate on their verdict.

Now, after due deliberation, the said Jury came into open Court, and being called, duly answered to their names and return the following verdict, to-wit :

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

*Defendant.*

**Verdict.**

We, the jurors in the case of Cora E. Nixon, plaintiff, against the Pacific Mutual Life Insurance Company of

California, defendant, find for the plaintiff, and award her as principal and interest, the total sum of \$10,991.75. *Ten thousand nine hundred and ninety-one dollar and seventy-five cents.*

Foreman,

B. E. HANEY.

And thereupon in open Court counsel for the defendant gave notice of a motion for a new trial herein.

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And, afterwards, to-wit: on Wednesday, the 29th day of September, 1892, the same being the twenty-eighth judicial day of the Regular July Term of said Court; present, the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

*In the Circuit Court of the United States, for the District of Washington, Western Division.*

CORA E. NIXON,

Plaintiff,

vs.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA (a corpora-  
tion),

Defendant.

**Order.**

And now, to-wit: on this 29th day of September, A. D. 1892, this cause came on for hearing on defendant's application for five days within which to file exceptions to the charge and instructions of the Court to the jury, and that all further proceedings in this cause be stayed for ten days, from September 28th, 1892, to enable defendant to prepare and file motion for new trial, and after due

consideration it is by the Court ordered that defendant be, and it is hereby granted five days from this date in which to file exceptions to the charge and instructions of the Court to the jury in this cause, and that all further proceedings in this cause be stayed for ten days from September 28th, 1892.

C. H. HANFORD,

—————  
Judge.

And, afterwards, to-wit; on the 3d day of October, 1892, there was duly filed in said Court in said cause, a stipulation in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, for the District  
of Washington, Western Division.*

CORA E. NIXON,

Plaintiff,

vs.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

Defendant.

**Stipulation.**

It is hereby stipulated and agreed by and between the parties in the above entitled action that the defendant's exceptions to the charge of the Court, as well as the bill of exceptions prepared in form may be presented to and signed by the Judge at the time the motion for new trial in this cause is argued and determined by the Court, and the time limited by Rule Twenty-three of this Court within which said exceptions shall be taken and bill of exceptions filed is hereby waived and the time extended as above agreed upon, and also the time limited in the order of Court heretofore made extending the time, is



hereby extended until the hearing and decision upon the motion for new trial.

It is further stipulated and agreed that the time for presenting the bill of exceptions of the record herein, and the signing of the same is extended until the time of hearing and determination of the motion for new trial herein; provided, that said bill of exceptions ready for signing are served and filed herein within the ten days from the date of the rendition of the verdict in this cause, and that all proceedings in this cause shall be stayed until the hearing and determination of the said motion for new trial.

CARROLL, PALMER, BRINKER & RELFO,

Attorneys for Plaintiff.

DOOLITTLE & FOGG,

Attorneys for Defendant.

And afterwards, to wit: on Monday, the 3d day of October, 1892, the same being at Chambers of said Court, present the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States, District of Washington, Western Division.*

CORA E. NIXON,

Plaintiff,

vs.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

Defendant.

And now, to wit: on this 3d day of October, A. D.

1892, this cause came on for hearing upon the stipulation signed by the parties hereto, stipulating that the time for excepting to the charge of the Court to the jury, as well as the time for presenting and signing bill of exceptions to said charge and the time for presenting and signing bill of exceptions of the record in this cause, as well as all proceedings herein, be extended to the time of the hearing and decision upon the motion for new trial filed in this cause.

It is therefore ordered and adjudged, that the time for excepting to the charge of the Court and for presenting and signing bill of exceptions in form to said charge, as well as the time for presenting and signing bill of exceptions of the record in this cause be, and the same is hereby extended until the hearing and decision upon the motion for a new trial filed herein, and all proceedings in this cause are hereby stayed until a decision upon said motion for new trial. C. H. HANFORD, Judge.

And afterwards, to wit: on the 3d day of October, 1892, there was duly filed in said Court in said cause a motion for a new trial and an arrest of judgment, in the words and figures as follows, to wit:

*In the Circuit Court of the United States, District of  
Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE

COMPANY OF CALIFORNIA

(a corporation),

*Defendant.*

**Motion in Arrest of Judgment and for a New Trial.**

Comes now the defendant herein, the Pacific Mutual Life Insurance Company of California, and moves the Court for an order vacating and setting aside the verdict, and that judgment be not thereon rendered, and for a new trial herein, upon the following grounds, to wit :

1.

On the ground of irregularities in the proceedings of the Court during the trial of said cause, by which the defendant was prevented from having a fair trial of said action.

2.

On the ground of irregularities in the conduct of the proceedings of the adverse party, which prevented the said defendant having a fair trial of said action.

3.

On the ground of misconduct of the jury during the trial of said action and finding said verdict, which prevented the said defendant having a fair trial of said action.

4.

On the ground that said verdict was given under the influence of passion and prejudice on the part of the jury, and thereby prevented this defendant having a fair trial of said action.

5.

On the ground that said verdict is not supported by the evidence in said cause.

6.

On the ground of the insufficiency of the evidence to justify the verdict in this action.

7.

On the ground that there was no evidence whatever to support said verdict.

8.

On the ground that said verdict is contrary to the evidence.

9.

On the ground that said verdict is contrary to law.

10.

On the ground that said verdict is contrary to the charge and instructions of the Court to the said jury.

11.

On the ground that the Court erred in the admission of evidence against defendant's objections and excluding evidence offered by defendant, all of which is fully shown by the record in this cause.

12.

On the ground that the Court erred in its instructions and charges to the jury.

13.

On the ground that the Court refused to give the requests to charge and each of them prayed for by defendant.

14.

On the ground that the Court erred in each of its sev-

eral instructions and charges to the jury, as is more fully shown by the exceptions of this defendant to said charge, as shown and embodied in defendant's exceptions and bill of exceptions to the charge of the Court to the jury in this cause, which exceptions and bill of exceptions were this day filed in this cause with the Clerk of this Court.

## 15.

That the Court erred in permitting plaintiff's counsel in his closing argument to the jury, to make statements outside of the record in this cause and not supported or warranted by the evidence in the case, and statements tending to arouse sympathy for the plaintiff and to create passion and prejudice in the minds of the jury against the defendant, a foreign corporation, whereby defendant was prevented from having a fair trial.

## 16.

This motion is made on the minutes of the Court, the notes of the evidence taken by the Judge and the shorthand reporter, and upon all of the evidence in the case and all rulings made and exceptions taken, and upon the pleadings and proceedings on file in the Clerk's office, and upon each of them, as well as upon the whole record in this cause.

DOOLITTLE & FOGG,

Attorneys for Defendant.

— — — — —

And, afterwards, to-wit: on the 3rd day of October, 1892, there was duly filed in said Court in said cause, the exception of the defendant to the charge of the Court, in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, District of  
Washington, Western Division.*

CORA E. NIXON,

*Plaintiff.*

vs.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY, OF CALIFORNIA,

(a corporation,)

*Defendant.*

**Exceptions and Bill of Exceptions to Charge of  
Court.**

Be it remembered, that on the trial of the above-entitled cause at the close of the evidence and before the commencement of the argument of counsel to the jury, the defendant handed to the Court, nine requests to charge the jury on behalf of the defendant; said requests to charge be consecutively numbered from one (1) to nine (9) inclusive, which requests to charge were duly filed with the Clerk of this Court.

That the Court refused to give the second request to charge, as aforesaid, to which refusal and ruling the defendant at the time duly excepted and exception allowed by the Court.

That the Court refused to give the fourth request to charge, as aforesaid, to which refusal and ruling the defendant at the time duly excepted and exception duly allowed by the Court.

That the Court refused to give the sixth request to charge, as aforesaid, to which refusal and ruling the

defendant, at the time, duly excepted and exception allowed by the Court.

That the Court refused to give the seventh request to charge, as aforesaid, to which refusal and ruling the defendant, at the time, duly excepted and exception allowed by the Court.

That the Court refused to give the eighth request to charge, as aforesaid, to which refusal and ruling the defendant, at the time, duly excepted and exception allowed by the Court.

That the Court refused to give the ninth request to charge, as aforesaid, to which refusal and ruling the defendant, at the time, duly excepted and exception allowed by the Court.

Be it further remembered that after the argument of counsel to the jury, in this cause the Court thereupon orally, charged and instructed the jury touching the law in this case and among other things stated to the jury as follows, to-wit: "And the only issue in this case is, as to whether or not, the second premium which fell due on the first day of September, 1890, was paid."

And the Court further charged and instructed the jury, "She cannot hold this company liable upon any promise of an agent of the company to accept anything except actual cash for the full amount due, within the time stipulated in the contract, but under the issues as they are formed she must prove that she actually paid the money and that the company got it."

And the Court further instructed and charged the jury, that "under the terms of the contract and the law

of the case the time when the money was due is a material part of the contract which the company had a right to insist upon and no tender of payment or offer of payment after the lapse of the time would place her in the same situation that actual payment would place her in, provided the tender was refused or not accepted."

And thereupon the Court further instructed and charged the jury as follows: "But an actual payment of the money so that the full amount was received by the company when paid by the plaintiff in this cause is a payment of that premium; and if received and retained by the company would be exactly equivalent to payment within the period provided in the contract when it should have been paid. In other words a payment is as much a payment made after the date when it was due and payable, provided it was received and retained by the company, as if it had been made before that time. To which charge of the Court to the jury the defendant then and there duly excepted and exception allowed by the Court.

And thereupon the Court further charged and instructed the jury: "Now, Mr. Frost appears by the pleadings and the evidence to have been acting for this company, and whatever he did within the scope of his authority to represent the company will be regarded as the act of the company. Acts of his unauthorized and outside of the scope of his authority as an agent of the company, are not binding upon the company unless he assumed to act for the company, and the company knew of his action and received and retained the benefit of his action, and failed promptly to give notice to the plaintiff that his act was not indorsed or approved by the com-



pany." To which ruling the defendant then and there duly excepted, and exceptions allowed by the Court.

The Court thereupon further instructed and charged the jury: "If he received money from the plaintiff for the company which he was not authorized at the time to receive, and yet retained it and applied it to the use of the company, with the knowledge of his superior officers in the company, and if they failed to notify the plaintiff that the payment was not approved or received by the company, and failed to return the money, if they received it, then it would be by reason of the failure of the company to repudiate his act promptly, equivalent to an authorized act, and may be regarded as the ratification of the action of an agent of the company in a matter in which he was previously unauthorized."

To which charge of the Court to the said jury the defendant then and there duly excepted and exception allowed by the Court.

Thereupon the Court further charged and instructed the said jury as follows: "If the plaintiff sent the amount of the second premium on this policy to Mr. Frost at Portland, to be applied as a payment of the second premium on this life insurance policy, Mr. Frost would have no right to receive and retain the money for any other purpose than as a payment on the policy as the second premium, according to the instructions sent with the money. If, however, being unauthorized, he simply retained the money temporarily, and promptly notified the plaintiff that it had not been applied in payment of the premium, the company would not be bound by his act in receiving the money. If, however, he retained the

money after being requested or notified by the plaintiff to return it, then his assumption in the matter of acting as trustee or agent for the plaintiff would be unwarranted, and, as far as he was acting with the knowledge of the managing officers of the company, would be binding upon them in the same manner as where he acted for the company in any other respect.

To which instruction and charge of the Court to the jury the defendant then and there duly excepted; and exception allowed by the Court.

And thereupon the Court further charged and instructed the jury as follows: "Under the peculiar conditions of this case it is one in which promptness and actual good faith was required on both sides:

It was required of Mr. Frost, if he did not intend to to apply the money he received in payment of this premium, to make the policy good, that he should give prompt notice. If he did give prompt notice, it was incumbent upon Mr. Nixon, or Mrs. Nixon to act definitely in the matter of furnishing the additional certificates that were required, or notify him that they could not or would not furnish them, and call for their money to be returned. If they did not notify Mr. Frost, and ask for the return of the money, and it was yet retained by Mr. Frost, with the knowledge of his superior officers in the company, then it cannot be insisted that he was asking as trustee or agent of the plaintiff in holding the money, but it will be regard as money received and retained by the company, and bind them to make an application of it as a payment in accordance with the

original intention and instruction of the plaintiff in sending it.”

To which instruction and charge of the Court, the defendant then and there duly excepted, and exception allowed by the Court.

And, thereupon, the Court further instructed and charged the jury, as follows: “ Now, it is for you to take into account the testimony, the letters and correspondence, which have been introduced, and decide what effect to give to this evidence, and determine whether the company received this money or not, and whether it has retained it after it should have returned it, in case the company declined to receive it as payment; and as you decide that question, you will make up your verdict for or against the plaintiff.

To which instruction and charge of the Court to the jury, the defendant then and there duly excepted, and exception allowed by the Court.

And, forasmuch as the refusal of the Court to give to the jury the defendant’s requests to charge the requests do not appear of record, and forasmuch as the above mentioned instructions and charges given by the Court to the jury, and defendant’s exceptions thereto, and the allowance of the said exceptions by the Court, do not appear of record, the defendant prays that this, its exceptions to the charge of the Court, and as its bill of exceptions thereto, may be allowed and sealed.

And said exceptions are accordingly allowed, and this bill of exceptions signed and sealed.

(Seal)

C. H. HANFORD, Judge.

And, afterwards, to-wit : On the 6th day of October, 1892, there was duly filed in said Court in said cause, the bill of exceptions of the defendant, in the words and figures as follows, to-wit :

*In the Circuit Court of the United States for the District of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

*Defendant.*

### **Complaint.**

Be it remembered, that all of the testimony and evidence in this cause, was taken down in shorthand by Charles B. Eaton, official stenographer of this Court, and that he has translated and extended his shorthand notes into longhand, and duly certified to the same, and filed the same in this cause, with the Clerk of this Court. That said extended notes and translations contains, among other things, each question propounded, and the answer thereto, of each witness that testified upon the trial of this cause, together with all objections, rulings of the Court and exceptions taken upon the trial of this cause, and shows all of the testimony and evidence offered and introduced by each party, together with objections, rulings of the Court and exceptions taken thereon.

That all of the letters, contracts and paperwritings,

whatsoever, in evidence in this cause, was duly identified by the reporter, by letter and figure.

That each and all of said exhibits, both on the part of the plaintiff and on the part of the defendant, are appended to said extended notes of the shorthand reporter. And said report contains all the testimony and evidence in said case, and all of the exhibits properly marked and identified, and all of which duly certified to by the said reporter, is now on file in the office of the Clerk of this Court, and a part of the record in this cause, and are appended hereto and made part hereof, and the same are now and hereby made a part of this bill of exceptions with the same and like effect as if all the extended notes of the shorthand reporter, and all of the testimony and evidence in said cause, objection of counsel, rulings of Court, exceptions taken and allowed, and all letters, policies of insurance, applications for insurance, and all paper writings whatsoever referred to and appended to said extended notes of said shorthand reporter was herein copied and set out at length, and that the same shall in all respects be regarded and treated as if copied into this bill of exceptions in *haec verba*. And upon the trial of this cause before His Honor C. H. Hanford, District Judge, and a jury duly impaneled and sworn, the plaintiff to maintain and prove the issue on her part, offered in evidence the policy of insurance upon which this suit was brought, executed by the Pacific Mutual Life Insurance Company of California to Thomas Lea Nixon, number 16594, and dated the first day of September, 1889, and appended to the extended notes of the shorthand reporter and marked "Exhibit A," and now on file as a part of

the record in this cause in the office of the Clerk of this Court.

The defendant objected to the introduction of said policy in evidence for the reason that it shows upon its face that it is only a part of a contract of insurance which was made on September 1st, 1889, by and between the defendant and Thomas Lea Nixon, the husband of the plaintiff, and the insured under the policy. This policy shows upon its face that that it was issued in consequence of the agreements and representations made in the application, which application is made part of this contract of insurance. So that upon its face it shows that the contract is in two parts, and if either part is admitted we are entitled to have both — to have the contract presented as a whole and not in part. As offered then, we say, it is incompetent and inadmissible. And defendant's counsel then and there tendered the other part of the contract, the original of it, that the counsel for plaintiff may offer it in evidence, if he desires, and so done, then defendant will make no objection to it.

*The Court*—Do you propose to offer the application, or not, Mr. Relfe?

*Mr. Relfe*—I do not, no, sir; I do not think it is necessary for us to offer anything which is in the hands of the opposite party who has pleaded it. If they desire to offer it we shall make no objection to it.

*The Court*—I will overrule the objection. It will be admitted in evidence and marked Exhibit "A."

*Mr. Fox*—We desire an exception.

*The Court*—An exception is allowed.

Thereupon plaintiff, Mrs. Cora E. Nixon, was called as a witness in her own behalf, and after being duly sworn, among other things, testified as follows :

I know Mr. Edward C. Frost.

Q. Do you know whether the second premium on the policy sued hereon was paid or not ?

A. Yes, sir.

It was paid to Mr. Frost, The payment was made to him by telegram, and was sent through the Merchant's National Bank of Tacoma to Ladd & Tilton's Bank in Portland. The money was transferred by the Ladd & Tilton Bank in Portland, to Mr. Frost.

Counsel for plaintiff thereupon handed witness a paper which the reporter then and there marked "Plaintiff's Identification 1," and which is a letter dated October 23d, A. D. 1890, purporting to have been written by Edward C. Frost to Thomas Lea Nixon; said letter is appended as an exhibit to the extended notes of the shorthand reporter, and is on file in this cause.

Thereupon the witness stated that she had seen the paper before, and that she found it on Mr. Nixon's desk among his papers.

Thereupon counsel for plaintiff handed witness two papers fastened together, which were marked by the reporter "Plaintiff's Identification 2," and which are appended as exhibits to the extended notes of the shorthand reporter, and are on file in the office of the Clerk of this Court in this case.

And upon cross-examination Mrs. Nixon was handed a letter by counsel for defendant, and asked if she wrote the letter, to which she answered that she wrote and

signed the letter, which was thereupon marked by the reporter as "Defendant's Identification 1," and is now appended as an exhibit to the said extended notes of the shorthand reporter, and is now a part of the record in this case on file in the office of the Clerk of this Court.

Upon re-direct examination Mrs. Nixon testified as follows :

*Mr. Relfe*—I will ask Mrs. Nixon one question about that.

Q. Mrs. Nixon, look at that envelope and letter ("Plaintiff's Identification 1"). Can you state if that envelope with the letter was found in Mr. Nixon's papers?

*Mrs. Nixon*—Yes, sir.

*Mr. Relfe*—Now, Your Honor, I offer in evidence this letter and envelope, the letter has been marked "Plaintiff's Identification 1," and the envelope accompanies it.

*Mr. Fox*—We object, in the first place, that they are not sufficiently proved and no foundation has been laid for their admission; and in the second place, that they are inadmissible under the pleadings.

*The Court*—I will sustain the objection. I think it is not legal evidence, for the reasons stated in the objection, and for the further reason that it is irrelevant.

*Mr. Relfe*—We except, your Honor.

*The Court*—Exception allowed.

Thereupon the plaintiff called Edward C. Frost, who being first duly sworn as a witness for the plaintiff, testified as follows :

I am the General Agent for the Pacific Mutual Life Insurance Company.



Q. Please examine the envelope and the enclosure. ("Plaintiff's Identification 1.") Did you write or authorize that letter to be written?

A. No, sir.

Q. You don't know anything about it? Was it submitted to you before it was sent?

A. No, sir. Every letter that is written in the office when I am present is submitted to me for my own signature.

Q. You don't know anything about that, then?

A. No, sir.

Q. Do you know who wrote it?

A. I expect [the bookkeeper, my bookkeeper, at that time wrote it.

Q. You never saw it before to-day?

A. No, sir.

*Mr. Relfe*—Now, your Honor, we will re-offer this this paper, "Plaintiff's Identification 1."

*Mr. Fox*—I make the objection that it is irrelevant, immaterial and inadmissible.

*The Court*—I sustain the objection.

*Mr. Relfe*—I ask for an exception.

*The Court*—An exception is allowed.

The plaintiff, by her counsel, thereupon stated as follows:

"We now offer in evidence the company's receipt, signed by the General Agent, Edward C. Frost, which has been marked 'Plaintiff's Identification 2.'"

*Mr. Fox*—I object to the paper which counsel offers being received in evidence as a receipt. It is not any such paper.

*Mr. Relfe*—I offer the paper for all the purposes of this case.

*Mr. Fox*—Then I object to it as irrelevant, immaterial and inadmissible.

*The Court*—I overrule the objection.

Defendant excepts and exception allowed.

Plaintiff's Identification 2, two papers fastened together, received in evidence and marked "Plaintiff's Exhibit B." The above and foregoing, including exhibits and stenographer's report of the evidence, being all the evidence offered and introduced on the part of the plaintiff to this point.

#### PLAINTIFF RESTS.

Thereupon the defendant, by its counsel, moved the Court to grant a nonsuit, upon the ground that plaintiff has failed to make out a case so as to put the defendant upon its defense, which motion was by the Court denied, to which ruling the defendant then and there duly excepted, and exception allowed by the Court.

#### DEFENDANT'S EVIDENCE.

Thereupon the defendant called William M. Fleming as a witness, who, being first duly sworn, testified as follows:

That in September, 1890, he resided in the City of Tacoma, and was special agent for the defendant, and that a few days, possibly a week, after the premium on the policy in suit became due he called at the office of Mr. Thomas Lea Nixon and had a conversation with him in reference to the policy in suit.

Q. I will ask you to state what that conversation was.

To which question the plaintiff, by her counsel, objected, and objection was sustained by the Court; to which ruling the defendant at the time duly excepted, and the exception allowed by the Court.

*Mr. Fox*—I now offer to prove by this witness that within the thirty days after the premium fell due, within the days of grace allowed, this witness, an agent of the company, called upon Mr. Nixon and had a conversation with him at his office, in which Mr. Nixon stated that he did not intend to pay this premium, but proposed to let the policy lapse.

To which offer the plaintiff objected, which objection was by the Court sustained; to which ruling the defendant excepted, and exception allowed by the Court.

Thereupon the defendant called Edward C. Frost, who, being first duly sworn, testified as follows :

On the same day that he received the money from the Teller of the Ladd & Tilton Bank he communicated with Mr. Nixon on the subject by letter, mailed through the regular channel, the postoffice, postage paid, the said letter being in the words and figures as follows, to wit :

October 31st, 1890.

*Thomas L. Nixon, Esq., Tacoma, Washington:*

DEAR SIR:—I have this day received through Messrs. Ladd & Tilton, the sum of \$517.80, which I hold in trust for you. Kindly have the enclosed blanks properly filled out by yourself and Mr. McCoy or Dr. Allan, and return to this office, on which they will be submitted to the company and if approved, I will receive the amount as

payment of second annual premium due September 1st, and now lapsed for non-payment, and send you company's receipt for same.

Yours Very Truly,

EDWARD C. FROST."

Two blanks were enclosed in that letter. One which required Mr. Nixon's own personal statement that he was then in good health, had received no injury since the policy lapsed, and desired to be reinstated; the second was to be filled out by the medical examiner who made the examination on first application of Mr. Nixon, stating that he was then in perfect health, or in as good health as at the time of the application when the company received it.

Q. State whether or not the requests contained in that letter as to having those blanks filled out and returned, was ever complied with?

A. No, sir.

Q. Now, Mr. Frost, please state to the Court and jury, what was done with the money for which you had given that receipt, and with reference to which you wrote Mr. Nixon on that day.

A. It remained with Messrs. Ladd & Tilton, and was afterwards put to the credit of Mrs. Nixon at her call.

Q. And was never paid to the company?

A. No, sir.

Q. I call your attention to this letter, which has been marked, "Defendant's Identification 1." Did you receive that letter?

A. Yes, sir.

Q. About what time?

A. The 23rd of December A. D. 1890.

*Mr. Fox*—This is a letter if your Honor please, which Mrs. Nixon identified yesterday as one written by herself, to the witness. I now offer it in evidence. Being a letter written and signed by the plaintiff in this cause, to Mr. Edward C. Frost and marked, “Defendant’s Exhibit 1,” and now appended as an exhibit to the said extended notes on file in the office of the Clerk of this Court in this cause.

Q. Now, did you respond to that letter which has just been read?

A. Yes, sir.

Q. When?

A. This letter was replied to the 26th day of December, 1890.

Q. Is this letter I hand you, the one you refer to?

A. Yes, sir.

*Mr. Fox*—We offer the letter in evidence.

Objected to by plaintiff. Objection overruled. Exception allowed.

Letter received in evidence and marked “Defendant’s Exhibit 2,” and said letter is now appended to the said extended minutes of the shorthand reporter of record in this cause in the office of the Clerk of this Court.

Mrs. Nixon made no response to that letter.

*Mr. Fox*—I now offer if your Honor please, the letter of May 1st, 1891, the enclosed certificate of deposit and the envelope in which it was enclosed with original endorsements, the signature of Mrs. Nixon on the envelope being admitted.

To which the plaintiff objected. Objection overruled, by the Court. Exception allowed.

The papers introduced in evidence and marked "Defendant's Exhibit 3," and are now appended to the said extended notes of the shorthand reporter and filed in the office of the Clerk of this Court, in this cause.

Thereupon letter written in April, 1891, by Mr. Frost to Mrs. Nixon, was identified and received in evidence, and marked "Defendant's Exhibit 4," and which is now appended to the said extended notes of the shorthand reporter, and of record in this cause in the office of the Clerk of this Court.

The defendant thereupon offered in evidence the application of Mr. Nixon for the policy of insurance sued on in this action, and same was received in evidence and marked "Defendant's Exhibit 5," and same is now appended to the said extended notes of the shorthand reporter and is on file and of record in this cause.

Thereupon both plaintiff and defendant announced that they had no further evidence to offer in the case, and this concluded the evidence in the case.

And forasmuch as the facts aforesaid and the decisions of the Court thereon do not appear of record, the defendant prays that this, its bill of exceptions, may be allowed, and the same is allowed and sealed accordingly.

C. H. HANFORD, (Seal)  
Judge.

Presented Dec. 28th, 1892.

Dollars 10,000.

THE PACIFIC MUTUAL

LIFE INSURANCE COMPANY OF CALIFORNIA.

Age, 40.

No. of Policy, 16,594.

Dividend Investment Policy.

Endowment.

—————  
This Policy of Insurance

Witnesseth that The Pacific Mutual Life Insurance Company of California, in consideration of the representations made to them in the application therefor, and of the agreements therein contained, which application is made a part of this contract, and of the sum of five hundred and seventeen dollars and 80 cents, and of the annual payment of a like amount, to be paid on or before twelve o'clock noon of the first day of September in every year during the continuance of this policy, does insure the life of Thomas L. Nixon of Tacoma, in the County of Pierce, and Territory of Washington, in the amount of ten thousand dollars, for the term of twenty years. And the said company does hereby promise and agree to pay the amount of the said insurance at its office in the City of San Francisco, to said Thomas L. Nixon or assigns, on the first day of September, 1909. Or should the person whose life is hereby insured die previous to the date last mentioned, leaving this policy unassigned, the said amount shall be payable, upon due notice and satisfactory proof of the death of the said insured, to Cora E. Nixon, wife of said Thomas L. Nixon.

In case of the maturity of this policy, the balance of the year's premium, and all indebtedness due or to become due to the company from the insured, or beneficiary,

shall first be deducted from the amount payable hereunder.

This policy is issued and accepted by the insured, and the owner thereof, on the following conditions and agreements:

First—That this policy is issued upon the “dividend investment plan,” and the said company agrees that should the premiums be paid as herein stipulated for fifteen full years from the date hereof, and that should the life insured survive said period of fifteen full years, that said company will pay the beneficiary under this policy, at the expiration of said period, its equitable proportion of the Dividend Fund, in accordance with the options of the second condition of this policy.

Second—At the close of the Dividend Period the said insured under this policy has the following options: 1. To withdraw in cash the accumulated dividends, together with the guaranteed surrender value mentioned upon the margin of this policy, in which case the insurance shall then terminate. 2. To withdraw the dividend in cash and allow the guaranteed cash value to remain with the company, in which case the policy can be continued in force, according to its terms, as an ordinary participating policy, or (provided premium payments continue) entered for an additional dividend period, the rate being the same as previously paid. 3. The full amount of the guaranteed value and dividend may be used in the purchase of full paid life or endowment insurance. 4. The guaranteed cash value, or the dividend, or both funds, may be used for the purchase of an annuity, payable in cash through life. Provided, however, that due notice



in writing shall be given said company by the owners hereof before the expiration of the dividend period of the option selected, and if no such written notice is received by said company, said company shall have the unquestioned right to exercise any one of the options herein provided for; and provided further, that the option of continuing the insurance in any form beyond the time, or for a larger amount than provided for in the original policy, shall be contingent upon the said insured at that time furnishing to the company satisfactory evidence of being in proper insurable condition. This policy shall not be entitled to any share in the Dividend Surplus of said company, other than at such times and after the manner and upon the conditions prescribed in this section.

Third—After premiums upon this policy have been duly received by said company for not less than three complete years, a paid-up policy without profits may be issued for the same amount as is allowed by the rules of the company on the surrender of corresponding ordinary policies; provided always, that surrender of this policy, duly receipted, be made to the company at San Francisco, Cala., while by its terms in full force and effect, or within ninety days of its date of lapse.

Fourth—That after the payment of the first premium hereon, a grace of thirty days for the payment of premium shall be allowed, but only in case the same is paid during the life-time of the insured aforesaid:

Limits of Occupation—During the first two years of the continuance of this policy the life insured hereunder is not permitted to engage in blasting, mining, or sub-

marine occupations, or in the production of highly inflammable or explosive substances; or to work or manage a steam engine, or a circular saw, in any capacity; or to engage as a mariner, engineer, fireman, conductor, brakeman, or laborer in any capacity or service upon any sea, sound, inlet, river, lake or railroad; or to enter any military or naval service whatever, excepting into the militia when not in actual service, without permission in writing signed by the President or Vice-President and Secretary or Assistant Secretary. Should death occur in consequence of a violation of any of the foregoing provisions, a special waiver not having been previously obtained from said company, then in such case this policy shall be null and void.

Assignment—That this policy shall not be assigned without the consent of the company in writing being first obtained, and in such case due proof of interest must be produced with the proofs of death.

Alterations—That no alteration or waiver of the conditions of this policy shall be valid, unless made in writing at the office of said company in San Francisco, and signed by the President or Vice-President and Secretary or Assistant Secretary.

Provided, however, that after two years from the date hereof, and the full payment of premiums hereon for two years, the only conditions which shall be binding upon the holder of this policy are: that he shall continue to pay the premiums at the times and place and in the manner herein stipulated; that the regulations of the company as to age shall be observed; and that proof of loss and action for recovery, if any, shall be made and brought as pro-

vided. In all other respects, after the expiration of said two years, and payment of premiums as aforesaid, the liability of said company shall not be disputed, unless the death shall have been caused by the wilful act of the beneficiary hereunder.

In witness whereof, the said The Pacific Mutual Life Insurance Company of California has, by its President and Secretary, signed and delivered this contract at the City of San Francisco, this first day of September, in the year one thousand eight hundred and eighty-nine.

Examined.

“ J. N. PATTON,”

“ GEO. A. MOORE,”

Secretary.

President.

The cash value of this policy, in addition to the dividend, all previous premiums hereon having been paid, will, upon the expiration of the Dividend Period, viz: September 1st, 1904, be (\$6,430.00), six thousand four hundred and thirty dollars.

[Endorsed]:

Number 16,594.

Register No., I.

The Pacific Mutual Life Insurance Company of California, San Francisco.

20 Year Endowment D. I. Policy on the Life of Thomas L. Nixon, in favor of Wife.

Amount, \$10,000.00.

Date, September 1st, 1889.

\$517.80. Annual payment, payable on the first day of September.

Plaintiff's Ident. 1.

Plaintiff's Exhibit "C," (Part 1.)

PORTLAND, Oregon, Oct. 23d, 1890.

*Thos. L. Nixon, Esq., Tacoma, Wash.*

Dear Sir :—

I find, upon examination of our records, that your life premium in amount \$517.80, has not been received at this office. As this directly affects your own interest, will you kindly notify me by return of your intentions, and oblige,

Yours very truly,

EDWARD C. FROST.

Plaintiff's Ident. 1.

Plaintiff's Exhibit "C," (Part 1.)

Pacific Mutual Life Insur.  
ance Co. of California.

Edward C. Frost, General  
Agent Oregon & Washing-  
ton, Office, N. E. Cor.  
Third and Oak Streets,  
Portland, Oregon.

Stamped Portland, Ore.,  
Oct. 23, 4 P. M. 90.

Thomas L. Nixon, Esq.,  
Tacoma,  
Wash.

Filed Sept. 27th, 1892. A. Reeves Ayres, Clerk.

Plaintiff's Ident. 2.

Exhibit "B."

PORTLAND, Oregon, Oct. 3, 1890.

Received from Ladd & Tilton, Bankers, five hundred seventeen 80-100 dollars, for account Thomas L. Nixon, policy per telegraphic instructions from Merchant's Natl. Dated Bk. Tacoma, 10-31, 1890.

\$517.80.

EDWARD C. FROST, Agt.

Duplicate.

Stamped, Ladd & Tilton, Bankers, Oct. 31, 1890.

Paying Teller.

Filed Sept. 27th, 1892. A. Reeves Ayres, Clerk.

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Plaintiff's Ident. 2.

Plaintiff's Exhibit "B."

Receipt of Frost, \$517.80, Oct. 31st, 1890.

Ladd & Tilton, Bankers.

PORTLAND, Or., Oct. 31, 1890.

*Merchant's Natl. Bank, Tacoma, Wash.*

Dear Sir:—

We debit \$517.80 pd. E. C. Frost, Agent, as per your telegram of to-day, herewith please find his receipt.

Stamped, (Received Nov. 1, 1890. Answered.)

Yours truly,

LADD & TILTON.

Filed Sept. 27th, 1892. A. Reeves Ayres, Clerk.

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Defendant's Exhibit 1.

Defendant's Ident. 1.

TACOMA, Wash., Dec. 22nd, 1890,

*Mr. E. C. Frost,*

Dear Sir:—

If you do not mean to accept the amount of premium, \$517.80, on Mr. Nixon's life insurance policy, as such, I shall be pleased to have it returned, so that I may use it towards paying taxes. Mr. Nixon is not yet well enough to furnish a *perfect* health certificate, although he is gaining rapidly. I was under a false impression when I sent the money, thinking the time had not lapsed, but that the "30 days" was just up, the *last* of Oct. instead of

the first, making difference of a whole month ; had gotten the idea from your letter of the 23d Oct., supposing from that, the time was not passed ; and not wishing to worry my husband about it, he having said " he felt that he could not spare so large an amount, when he was not able to earn more, and guessed he would let it go." Undertook to attend to it myself, without sufficiently looking into the matter, and as I did not know where to find Mr. Flemming, he having no office here, sent the money direct to you. If Mr. Nixon wishes to be reinstated when he returns, he can then send the money ; he is delighted with the climate at St. Helena, California, and does not wish to spend another winter in Tacoma.

Please accept Christmas Greeting for yourself and wife, from  
 Yours very truly,  
 817 N. K. St., Tacoma. CORA E. NIXON.

Filed Sept. 27th, 1892. A. Reeves Ayres, Clerk.

STATE OF CALIFORNIA, }  
 City and County of San Francisco. } ss.

Samuel M. Marks, Assistant Secretary of the Pacific Mutual Life Insurance Company of California, being duly sworn deposes and says : that the foregoing and annexed application for insurance to said company by Thomas L. Nixon, dated August 15, 1889, is a true and correct copy of said application, in which Policy No. 16,594 was issued. SAMUEL M. MARKS.

Subscribed and sworn to before me this 19th September, 1892. GEO. T. KNOX.

(Seal) A Commissioner of Deeds for the State of Washington at San Francisco, California.

Filed Sept. 27, 1892. A. Reeves Ayres, Clerk.

Application No. 15 Date of Policy 18 Amount, \$ 1,000.00 Age 34 Annual Premium, \$ 4 Agency Agency Medical Director Date 11/24/26

APPLICATION FOR INSURANCE TO

The Pacific Mutual Life Insurance Company of California.

QUESTIONS TO BE ASKED BY AGENT.

Statements and Representations required from persons proposing to effect Insurance on Lives in this Company, and which it is hereby mutually agreed to form a part of the Contract with the Company

- 1. Name, at full length, of the person whose life is to be insured.
Occupation.
2. Name, at full length, of the person to whom insurance is payable at death.
Relationship to the person whose life is proposed for insurance?
3. What form of policy do you desire?
4. Give the place and date of your birth.

Place of business: Shall Notices of Premiums coming due be addressed to last named person at place of business as stated?
The "Place of business," if not specially given, will be assumed to be the same as "Residence."
Table with columns: DAY, MONTH, YEAR, AGE NEAREST BIRTHDAY

- 5. Are you single or married?
6. Are you now and usually in good health?
7. Are you now insured in this Company?
8. Have you any other insurance on your life?
9. Have you ever applied to any agent or sought insurance in any company which either applicant refused to issue a policy, or declined to issue a policy of the exact kind and amounts applied for?
10. Have you resided out of the United States?
11. Has your weight recently increased?
12. Do you use Spirits, Wine or Malt Liquors, daily, or occasionally, and to what extent?
13. Are you engaged in or connected with the Manufacture or Sale of Malt, Vinous or Spirituous Liquors?
14. Do you use Tobacco?
15. Do you understand and agree that only the officers at the Home Office have authority to determine whether or not a policy shall issue on any Application...

Give the number of each Policy and the amount assured hereby, separately.
Table with columns: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z

IT IS HEREBY DECLARED AND WARRANTED that all the statements and answers made in this Application (including the answers to questions to be asked by Agent and the questions to be asked by the Medical Examiner) are complete and true and that together with this declaration and agreement constitute an application to THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA...

Dated this day of 18
Policy to be dated the first day of 18
All Policies of the Company are issued as of the first day of the month.

Signature of Applicant, Agent, and Representative of the Person whose Life is to be Insured.
I understand that my name will appear in the name of the person whose life is to be insured...

This Margin is for Binding do not write upon it.

Defendant's Exhibit 3, (Part 1)

PORTLAND, Oregon, May 1st, 1891.

*Mrs. T. L. Nixon, Tacoma, Wash.*

Dear Madam—

Enclosed please find certificate of deposit No. 73,673, in amount \$517.80, that we failed to enclose in our letter to you under date April 30th.

Very Truly Yours,

EDWARD C. FROST.

Per H.

Defendant's Exhibit 3, (Part 3)

Refused, Cora E. Nixon.

59 Home Office Building  
Pacific Mutual Life Ins. Co.  
Of California.  
Edward C. Frost, Gen. Agt.,  
Oregon and Wash. Office,  
N. E. cor. Third & Oak Sts.  
Portland, Oregon.

Stamps 5 2 cent and 1 10 cent.
2239 1597 Rec. May 4, 91
1661 1211
Edward C. Frost,
Tacoma,
Pierce Co. Wash.,

PORTLAND, OR., May 5, 1891.

Registered.

Stamped, PORTLAND, Oregon, May 2, 1891.

Filed Sept. 27, 1892. A. Reeves Ayres, Clerk.

Defendant's Exhibit 4.

PORTLAND, Oregon, April 30th, 1891.

*Mrs. T. L. Nixon, Tacoma, Wash.,*

Dear Madam—

We have this day placed to your credit with Ladd & Tilton, Bankers of this city, the amount of \$517.80.



Said sum having been received from you October 31st, 1890, and held in trust by me, in accordance with terms embodied in my letter of same date.

I have carefully and thoroughly submitted all the facts, correspondence, &c., in this case to the home office for their consideration, and they instruct me to say that my position in this matter is eminently correct; there is no legal claim under Policy No. 16594, as said policy lapsed and was not restored to risk. Therefore the blanks requested cannot be furnished.

Respectfully yours,

EDWARD C. FROST.

Filed September 27th, 1892. A. Reeves Ayres, Clerk.

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Defendant's Exhibit 2.

PORTLAND, Oregon, Decr. 26, '90.

*817 North K St., Tacoma, Wash.,*

Dear Mrs. Nixon—

Yours of the 22d inst. to hand. I called to see you in Tacoma one day only after yourself and Mr. Nixon had left for the South. Knowing the state of Mr. Nixon's health at the time the policy payment was due, I sent him several notices and asked my agent Fleming to see him also; but not hearing, I concluded he did not want to carry it. I sent however, several reminders to him, as the Policy allows 30 days grace. After the 30 days the Policy can only be restored during 90 days unless the deposit of premium is made with the agent or company. This you have done, and now you must decide what to do, for if you withdraw the deposit you will forfeit the right to restore the Policy to risk, as the 90 days are

gone by. I thought from what I heard from Dr. McCoy that in all probability Mr. Nixon would by this time be able to pass the required test, which is not severe, and if you think he is able, and will give me the permission, I will write to the Company and have the nearest Medical Examiner to where he is staying, see him. It is a pity that he should lose the insurance, which he may not be able to get again even if he wants to, and also to lose the money he has already paid in.

I expect to be in Tacoma in January, and will call and see you about this. However, if in view of the case you desire to have the deposit returned, I will do so at once. Wife joins me in kindest regards and hopes for Mr. Nixon's perfect recovery. With many "Happy New Years,"

Yours very truly,

E. C. FROST.

(Written on side of sheet.)

I assure you I would and have done all in my power to protect your interests. All Life Ins. Cos. are very strict, and if I had accepted the payment when sent by you I should be held liable to forfeit my bonds of \$7,500.00.

Filed Sept. 27, 1892. A. Reeves Ayres, Clerk.

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#### **Plaintiff's Case.**

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*In the United States Circuit Court for the District of  
Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY (a corporation),

*Defendant.*

*Transcript of Testimony taken on the trial of the above  
entitled action before Honorable C. H. Hanford, J.,  
and a jury, at the Court room of said Court, in Ta-  
coma, Pierce County, Washington, on the 27th and  
28th days of September, 1892.*

## APPEARANCES.

For the plaintiff—

Mr. Relfe, of Seattle, Mr. Thomas Carroll and Mr. Leroy Palmer, of Tacoma.

For the defendant—

Mr. Charles N. Fox, of San Francisco, Cala., and Mr. Charles S. Fogg, of Tacoma.

TACOMA, Wash., 11 A. M.

TUESDAY, September 27th, 1892.

This cause coming on regularly for trial on this day, in open Court, and at a regular term of this Court, the plaintiff being present in person, with her attorneys, and the defendant being represented by its attorneys, a jury having been duly impaneled and sworn to try the case, thereupon proceedings were had and testimony taken as follows:

*The Court*—Gentleman of the jury, you will now be permitted to separate until two o'clock. You must not converse about the case with each other nor with any other persons, nor listen to anything that may be said about it by anybody. Have no intercourse whatever with the attorneys, witnesses, or other persons interested in the case. Try to avoid, as much as possible, getting any impression about the case outside of the court room.

Court will now take a recess until two o'clock.

TACOMA, Wash., 2 P. M.

TUESDAY, September 27th, 1892.

All present; proceedings continued pursuant to adjournment.

*Mr. Relfe*—If the Court please, we wish to make a motion to strike out a portion of the matter in the amended complaint on the ground that it is redundant and irrelevant. The clauses we move to strike out are the fifth and sixth clauses.

After argument by counsel.

*The Court*—I will deny the motion. It may have been unnecessary to have this matter in the answer, and it is a part of the contract sued upon and alleged to be a part of the contract.

*Mr. Relfe*—Will your Honor give us an exception?

*The Court*—An exception is allowed.

Plaintiff's case opened to the jury by Mr. Palmer.

Defendant's case opened to the jury by Mr. Fox.

*Mr. Relfe*—If your Honor please, we will first offer in evidence the policy upon which suit is brought. The policy I offer in No. 16,594, executed by The Pacific Mutual Life Insurance Company of California to Thomas Lea Nixon, dated the 1st day of September, 1889.

*Mr. Fox*—We object. That is incompetent as offered for that it shows upon its face that it is only a part of a contract of insurance which was made September 1st, 1889, by and between this defendant and Thomas Lea Nixon, the husband of plaintiff, and the insured under the policy. The policy shows upon its face that it was issued in consequence of the agreements and representations made in the application, which application is made part of this contract of insurance. So that upon its face it shows that the contract is in two parts, and if either part is admitted we are entitled to have both—to have the contract presented as a whole and not in part. As

offered then, we say, it is incompetent and inadmissible. And I now tender the counsel the other part of the contract, the original of it, and he may offer it if he likes, and then we will make no objection to it.

*The Court*—Do you propose to offer the application or not, Mr. Relfe?

*Mr. Relfe*—I do not, no sir; I do not think it is necessary for us to offer anything which is in the hands of the opposite party who has pleaded it. If they desire to offer it, we shall make no objection to it.

*The Court*—I will overrule the objection. It will be admitted in evidence and marked Exhibit A.

*Mr. Fox*—We desire an exception.

*The Court*—An exception is allowed, and it will be considered as read to the jury.

Paper referred to, received in evidence, and marked “Plaintiff’s Exhibit A.”

*Mr. Relfe*—We will call as our first witness, Mrs. Cora E. Nixon.

Mrs. Cora E. Nixon, Plaintiff, called as a witness on her own behalf, being first duly sworn, testified:

EXAMINATION-IN-CHIEF BY MR. RELFE.

Q. You are the plaintiff in this, are you not?

A. I am.

Q. The widow of Thomas Lea Nixon?

A. Yes.

Q. Do you know Mr. Frost?

A. Yes.

Q. You know Mr. Edward C. Frost, who was connected with The Mutual Life Insurance Company of California?

A. I do know him.

Q. Did you know him in the year 1889 and 1890 ?

A. I do not remember of seeing him at that time.

Q. I did not ask you if you saw him; did you know him ?

A. Yes, sir.

Q. Do you know his signature ?

A. No, sir.

Q. Do you know whether the second premium on the policy, sued hereon, was paid or not ?

A. Yes, sir.

Q. It was paid ?

A. Yes, sir.

Q. To whom was it paid ?

A. To Mr. Frost.

*Mr. Fox*—Which premium are you inquiring about?

*Mr. Relfe*—The second premium ; you admit payment of the first ?

*Mr. Fox*—Yes, sir.

Q. What relation, do you know, did Mr. Frost then occupy towards this defendant, The Pacific Mutual Life Insurance Company ?

A. That of general agent.

Q. How much was the amount of that premium paid to him, under this policy ?

A. \$517.80.

Q. How was the payment made to him ; what was the method of payment ?

A. It was sent by a telegram through the bank.

Q. Through what bank ?

A. Through the Merchant's Bank of Tacoma, the Merchant's National Bank, of Tacoma.

Q. Directly to Mr. Frost ?

A. To Ladd & Tilton's Bank.

Q. Ladd and Tilton ?

A. I believe so.

Q. Where ?

A. In Portland.

Q. The money was delivered by the Ladd & Tilton Bank in Portland, to the Merchant's Bank here, for Mr. Frost ?

A. It was sent by the Merchant's Bank, to Portland to Mr. Frost, through Ladd and Tilton's Bank, I think.

Q. Transferred to Mr. Frost ?

A. Yes, sir.

Q. Is that it ?

A. Yes, sir.

Q. How did the Merchants' Bank come to send it ?

A. The Assistant Cashier sent it.

Q. Who directed the Assistant Cashier to send it ?

A. I did.

Counsel hands witness a paper which the reporter has marked "Plaintiff's Identification 1."

Q. I wish you would look at this paper, "Plaintiff's Identification 1." I will ask you whether you have ever seen that paper before ?

A. Yes, sir; I have.

Q. Where did that paper come from, if you know ?

A. It came from Mr. Frost.

Q. I mean, where you find it,—where did you see it ?

A. On Mr. Nixon's desk.

Q. It was on Mr. Nixon's desk ?

A. Yes, sir.



Q. Among his paper ?

A. Yes, sir.

Two papers, fastened together, which have been marked by the reporter "Plaintiff's Identification 2," handed to witness.

Q. I will ask you if you have ever seen these papers before ?

A. I have seen them.

Q. State where they came from, and who received them ?

A. They were received by the Merchant's National Bank, and Mr. Davis gave them to me.

Q. Mr. Davis is the Cashier ?

A. Yes, sir.

Q. They were received by the bank, and the Cashier gave them to you ?

A. Yes, sir.

Q. Mrs. Nixon, what was the date of this payment ?

A. The 31st of October, 1890.

Q. Will you explain why it was not paid earlier ?

No answer.

Q. What effort did you make before that to pay it during October, or any other time ?

A. I tried to find Mr. Fleming, the local agent here, who I supposed was the proper person to pay it to.

Q. Well, could you find the local agent, Mr. Fleming ?

A. He was out of town.

Q. What effort did you make to find him ?

A. I went in company with my cousin, who knew

where he boarded, and knew him, to his hotel, the Palmer House; he was not in.

Q. He was out of town, was he?

A. We were told he was out of town; I don't remember where.

Q. Do you know whether he returned to town before the end of October or not?

A. I don't think he did; I did not hear of it.

Q. Well, what, if anything, did you hear?

*The Court.*—I think you are liable to spend time unnecessarily on irrelevant matters, from the opening statements made on both sides. The reasons for not paying the premiums sooner, and the conversations or correspondence that occurred, the statement that Mr. Nixon had said he would not pay any more premiums—all those things I think are immaterial. The liability of this company would be fixed, if at all, by what occurred at the time the money was sent and received by Mr. Frost, and what occurred after that, not what occurred before.

*Mr. Relfe*—I understand it is insisted, or will be, by the defendant, that the mere fact of payment after maturity, under the contract constitutes a forfeiture, or justifies the forfeiture unless we show reasons that would explain and satisfy that objection we will have no right to recover. I only wanted to ask one further question in that connection, and that was, what, if anything, she heard as coming from the local agent in reference to the payment or non-payment of that premium during the month of October.

*The Court*—I do not think it would benefit either party to go into matters of that kind. The terms of the policy and the actual transactions that took place, what was

said, done or written in connection with the actual payment of the money, is all that has any legal bearing on this case.

*Mr. Relfe*—We propose to show, your Honor, that it was approved by the company and its agent that we might defer payment, and we were told that if it was paid any time during the month of October it would be sufficient. Now, we say, if that is the fact the company is estopped from charging us with dereliction on that ground, inasmuch as we did not pay within the time indicated; and certainly they could not adopt such a course of conduct as would lead us to delay our payment and then attempt to take advantage of that fact, and we now simply offer, in good faith, to show the cause of that delay, and offer this testimony for the purpose of bringing out that feature and none other.

*The Court*—I have indicated my views simply from a desire not to have the case weighted down with inquiries about matters that are not important and which cannot be taken into legal consideration. Of course there has been no objection and I have volunteered my opinion on these questions, but I am willing to sustain an objection made on either side to any offer of such testimony as was proposed in the opening statements of counsel on both sides, either to prove excuses for not making the payment sooner, or to show what took place in the way of conversation or correspondence between the parties prior to the time that the money was sent.

*Mr. Relfe*—We will put the question so as to get the ruling of the Court, if objection is made.

Q. I will ask you this question: What, if anything, did you hear as coming from the agent of the company here, to the effect that the payment of that second premium might be made at any time before the last of October, 1890?

*Mr. Fox*—That is objected to as incompetent and inadmissible under the contract, and irrelevant and immaterial under the pleadings.

*The Court*—I will sustain the objection.

*Mr. Relfe*—We desire an exception.

*The Court*—An exception is allowed.

Q. Your husband died April 16th, 1891?

A. Yes, sir.

Q. Did any other premium become due, or did he die before any further premiums became due?

A. He did.

*Mr. Relfe*—Take the witness.

CROSS-EXAMINATION BY MR. FOX.

Q. Mrs. Nixon, do you remember what day you sent that money, the day you say you ordered the bank to forward it by telegram?

A. The 31st day of October, 1890.

Q. Where was your husband at that time?

A. He was at home.

Q. You are not the party who made this contract of insurance, are you?

A. *Mr. Relfe*—That is objected to as immaterial and irrelevant, and asking a legal question of the witness.

*The Court*—I overrule the objection. She can state what her understanding about it was. Of course, the

contract shows upon its face who the parties to it were, but it is proper cross-examination.

A. I would judge that I was interested in the contract as much as any one.

Q. Well, whatever your interest was, is shown by the contract itself, is it not?

A. Yes, sir.

Q. Did you not know at the time you sent that money and sometime before that, that your husband had refused to pay that premium?

A. I did not.

Q. Did he not tell you that he would not pay it?

A. No, sir.

Q. Did you not write Mr. Frost, that he had told you that he would not pay it, and so you took it upon yourself?

A. I do not remember that I did.

Paper handed witness.

Q. Look upon that paper, Mrs. Nixon, and say if that is your handwriting.

A. That explains itself, as well as I can.

Q. But did you write that letter?

A. I did.

Q. And that is your signature and in your writing?

A. Yes, sir.

*Mr. Fox*— I ask you to have that letter marked for identification.

Letter referred to, marked "Defendant's Identification 1."

Q. I will ask you, Mrs. Nixon, to look at the signa-

tures to this application for life insurance, and say whether that is your husband's signature or not.

*Mr. Relfe*—We will admit that it is.

*Mr. Fox*—That is all.

RE-DIRECT EXAMINATION BY MR. RELFE.

Q. I would like to ask you, with the permission of counsel, a question which I forgot on the examination-in-chief. I will ask you, Mrs. Nixon, if, after the death of your husband, you applied to the company, or its agents, for blanks upon which to make the proof of death?

A. I did.

Q. Were they furnished?

A. No, sir.

Q. Were they refused?

*Mr. Fox*—There is no issue made on that point. The only issue we make in this case, is as to whether they paid that second premium.

*The Court*—I do not think you need to go into that.

*Mr. Relfe*—That is all, then.

*Mr. Fox*—That is all.

Examination of Mrs. Nixon closed.

Mr. Edward S. Orr, called as a witness for the plaintiff, and having been first duly sworn, testified:

EXAMINATION-IN-CHIEF BY MR. RELFE.

Q. Do you live in Tacoma?

A. Yes, sir.

Q. Did you know Mr. Nixon in his lifetime?

A. Yes, sir.

Q. Do you know Mrs. Nixon?

A. Yes, sir.

Q. Do you know Mr. Fleming, the Local Agent of The Pacific Mutual Life Insurance Company ?

A. Yes, sir.

Q. Did you know him in 1889 and 1890 ?

A. I knew him in 1890.

Q. I will ask you whether Mr. Fleming at any time said anything to you to be conveyed to Mrs. Nixon, as to whether the second premium on this policy—this Nixon policy—could be paid any time during the month of October, before the last of the month ?

*Mr. Fox*—I object to that as irrelevant, immaterial inadmissible under the pleadings, and incompetent.

*The Court*—I sustain the objection.

*Mr. Relfe*—We ask for an exception.

*The Court*—An exception is allowed.

*Mr. Relfe*—That is all.

*Mr. Fox*—That is all.

Examination of Mr. Orr closed.

*Mr. Relfe*—Judge Fox, do you admit that the signa, to Plaintiff's Exhibit 1, is Mr. Frost's signature, and admit that he wrote that letter ?

*Mr. Fox*—We cannot admit that that letter was written by Mr. Frost.

*Mr. Relfe*—The letter is typewritten; do you admit that it is his signature ?

*Mr. Fox*—We cannot admit that.

*Mr. Relfe*—Do you refuse to admit that he wrote this letter or authorized it to be written, or signed it ?

*Mr. Fox*—Yes, sir.

*Mr. Relfe*—Then I will have to ask Mrs. Nixon one question about that. Mrs. Nixon, look at that envelope

and letter ("Plaintiff's Identification 1.") Can you state if that envelope, with the letter, was found in Mr. Nixon's papers?

*Mrs. Nixon*—Yes, sir.

*Mr. Relfe*—Now, your Honor, I offer in evidence, this letter and envelope, the letter has been marked "Plaintiff's Identification 1," and the envelope accompanies it.

*Mr. Fox*—We object; in the first place, that they are not sufficiently proved, and no foundation has been laid for their admission, and in the second place, that they are inadmissible under the pleadings.

*The Court*—I will sustain the objection. I think it is not legal evidence, for the reason stated in the objection, and for the further reason that it is irrelevant.

*Mr. Relfe*—We except, your Honor.

*The Court*—Exception allowed.

*Mr. Relfe*—We will call Mr. Frost on that point.

Mr. Edward C. Frost called and sworn as a witness for the plaintiff, testified:

EXAMINATION-IN-CHIEF, BY MR. RELFE.

Q. You are Mr. Edward C. Frost?

A. Yes, sir.

Q. The General Agent of The Pacific Mutual Life Insurance Company?

A. Yes, sir.

Q. Please examine this envelope and the enclosure ("Plaintiff's Identification 1"). Did you write or authorize that letter to be written?

A. No, sir.

Q. You don't know anything about it?



A. It was sent from my office I see, and signed by the bookkeeper, I presume.

Q. You don't know anything about it? Was it submitted to you before it was sent?

A. No, sir. Every letter that is written in the office when I am present is submitted to me for my own signature.

Q. You don't know anything about that, then?

A. No, sir.

Q. Do you know who wrote it?

A. I expect the bookkeeper; my bookkeeper at that time wrote it.

*Mr. Fox*—Well, do you know? Do you know who did write it? That is the question.

A. I did not see it written, sir; I could not. No, I don't know.

Q. You never saw it before to-day?

A. No, sir.

Q. Are any of your employes in the habit of writing important letters of that character without your knowledge or direction?

*Mr. Fox*—I object to that as irrelevant and immaterial.

*The Court*—It is preliminary. I will allow the question.

A. Notices are sent of premiums due without any special supervision.

Q. I say, letters of this character?

A. That is a notice of premium due,—yes.

Q. Never mind what it is. I will read it to the jury if you undertake to state its contents. I say, are your employes, or those in your office in the habit of writing

letters of this character without your knowledge or consent?

A. Yes, sir, of that character; yes, sir.

Q. They are?

A. Yes, sir.

Q. Are your employes and subordinates in your office permitted to write letters to policy holders after the maturity of the premium, giving direction as to the payment thereof?

A. Yes, sir.

*Mr. Relfe*—That is all.

CROSS-EXAMINATION BY MR. FOX.

Q. Was there anybody in your office, or was even yourself authorized to write letters with reference to premiums more than thirty days past due.

*Mr. Relfe*—We object to that, your Honor, because it is established in testimony here that he is a General Agent of the company and his authority, and the scope of his acts cannot be limited by his own testimony.

*The Court*—I will overrule the objection.

*Mr. Relfe*—We ask for an exception.

*The Court*—Exception allowed.

A. Yes, authorized to write letters concerning them, but not to receive them. A policy holder—

*Mr. Relfe* (Interrupting)—Wait a moment. Answer that question and stop. We object to your going any further without further questions.

*Mr. Fox*—I have no further cross-examination.

*Mr. Relfe*—That is all.

Examination of Mr. Frost closed.

*Mr. Relfe*—Now, your Honor, we will re-offer this paper, “Plaintiff’s Identification 1.”

*Mr. Fox*—I make the objection that it is irrelevant, immaterial and inadmissible.

*The Court*—I sustain the objection.

*Mr. Relfe*—I ask for an exception.

*The Court*—An exception is allowed.

*Mr. Relfe*—We now offer in evidence the company’s receipt signed by the General Agent, Edward C. Frost, which has been marked “Plaintiff’s Identification 2.”

*Mr. Fox*—I object to the paper which counsel offers being received in evidence as a receipt. It is not any such paper.

*Mr. Relfe*—I offer the paper for all the purposes of this case.

*Mr. Fox*—Then I object to it as irrelevant, immaterial and inadmissible.

*The Court*—I overrule the objection.

*Mr. Fox*—We except.

*The Court*—Exception allowed.

Plaintiff’s Identification 2, two papers fastened together, received in evidence and marked “Plaintiff’ Exhibit B.”

Exhibit B read to the Jury by M. Relfe.

Mr. R. J. Davis called as a witness for the plaintiff, and being first duly sworn, testified :

EXAMINATION-IN-CHIEF BY MR. RELFE.

Q. What is your name ?

A. R. J. Davis.

Q. What business are you in ?

A. I am Assistant Cashier of the Merchant's National Bank of Tacoma.

Q. Were you in that same position in October, 1890?

A. I was.

“Exhibit B” handed witness.

Q. Please examine that receipt there and say if you have seen it before?

A. I have.

Q. State what your connection was with that receipt,—that transaction, briefly to the Jury?

A. Acting for the Merchant's National Bank, I telegraphed Ladd and Tilton, Bankers, Portland—

*Mr. Fox*—I object to what you telegraphed unless the telegram is produced.

*Mr. Relfe*—I understand we can produce that telegram if necessary, but this is merely descriptive. Go on.

A. To pay Edward C. Frost, Agent, \$517.80, on account Thomas L. Nixon policy, and in compliance with the telegram they advised us that they did pay the money, and sent this receipt (“Exhibit B”) in evidence of it.

Q. For whom did you do that, Mr. Davis?

*Mr. Fox*—That is objected to as irrelevant and immaterial.

Q. For whom did the Bank do it?

*Mr. Fox*—That is objected to as irrelevant and immaterial.

*The Court*—I will overrule the objection.

A. For Mrs. Cora E. Nixon.

Q. The plaintiff?

A. Yes, sir.

Q. Now, have you your telegram that you sent them, sent to Ladd & Tilton ?

A. I have neither the telegram nor copy with me ; I might have brought the copy as well as not. I had a memoranda which I took from the copy. Of course the office can produce the telegram if you want it.

*Mr. Fox*—You say you took that memorandum from the copy. Is that a letter press copy ?

A. It is.

Q. Is that memoranda an exact copy of the letter press copy of the telegram ?

A. Yes, sir.

*Mr. Fox*—Perhaps I will admit that. What I want to get at is to know just how it read. If the witness can now read to us as if he had the copy before him, and testify that it is just what the copy shows, I am satisfied with it.

Q. Can you do that ?

A. I can.

Q. Proceed.

A. The telegram read as follows: "October 31st, 1890. Ladd & Tilton, Bankers, Portland, Oregon. Paygent Edward C. Frost, Agent, disbelieve deaconess cloud account Thomas L. Nixon policy free mason alpha Merchants National Bank."

Q. Now, please translate that into English.

A. Which translated, means, "Pay to Edward C. Frost, Agent \$517.80 account Thomas L. Nixon policy, Friday 12 o'clock noon." Signature. That is the last word is the telegraphic signature of the bank.

Q. The Merchants' National Bank?

A. Yes, sir.

Q. That cipher was the one used between your bank and Ladd & Tilton's Bank?

A. I have the cipher with me.

Q. I say it was one you had between the two banks, which both understood?

A. It was.

*Mr. Relfe*—That is all.

*Mr. Fox*—That is all.

Examination of Mr. Davis closed.

Mrs. Cora E. Nixon, plaintiff, re-called, testified:

EXAMINATION-IN-CHIEF BY MR. CARROLL.

Q. Mrs. Nixon, I hand you a paper marked "Plaintiff's Identification 1," and ask you to look at that paper carefully; and then I will ask you to state whether or not that had anything to do as an inducement to you to send the money to Mr. Frost at the time you did send it?

*Mr. Fox*—That is objected to as immaterial, incompetent and inadmissible.

*The Court*—The question is a leading question.

Q. I will put it in this form: State what, if any, effect—Or first, I will ask you when you first knew of this letter, when you first saw it, as near as you can give us the date.

A. I don't know the exact date, but it must have been a very few days after it was received because it was right open just like that (indicating).

Q. Well, was it before you sent the \$517.80 or not?

A. It was before.

Q. Then how long before, as near as you can recollect?

*Mr. Fox*—I object.

*The Court*—Objection overruled. It is a preliminary question.

A. It was a full week, if not more; it was a week anyway.

Q. About a week you think?

A. Yes.

Q. And not more than a week?

A. Yes; during that week.

Q. Now, I will ask you state what, if any, effect this letter had upon you as an inducement, or otherwise, to pay that premium?

*Mr. Fox*—That is objected to as irrelevant, immaterial, incompetent and inadmissible.

*Mr. Carroll*—We claim that there is sufficient inducement in this for Mrs. Nixon to pay that money. This is offered simply in explanation of how that money happened to be sent at that time, or as showing a reason justifying her in sending the money and getting that receipt after the premium was due. We think the two bear that relation, one to the other, and that they both ought to go to the jury in this case.

*The Court*—I do not think the effect of the payment to, or the receipt by Mr. Frost of the money would be at all changed by what preceded it. I am of the opinion that this matter is irrelevant, and will sustain the objection.

*Mr. Carroll*—We except.

*The Court*—Exception allowed.

*Mr. Relfe*—There is an allegation here, your Honor, in the reply as to the nonforfeiture law of California. We have pleaded that act, but Brother Fox says that it has been repealed. We want to offer it before we finally close our case, but we are not prepared to do so at this time.

*The Court*—I do not think that would come in properly at this time. I think that is a part of your case in rebuttal.

*Mr. Relfe*—With that understanding, then, we will rest our case.

Plaintiff rests.

*Mr. Fox*—If your Honor please, plaintiff having rested, I now move a nonsuit on the ground that plaintiff has failed to make out a case such as puts the defendant upon its defense.

Argument of the motion for nonsuit by Mr. Fox.

*The Court*—I do not care to hear any argument from the plaintiff's side on this motion. The answer admits the making of a contract, admits the policy, and while it pleads the application as a part of the contract, yet it is pleaded defensively, and enough appears to show that it is within the possession of the insurance company, and not in the possession of the plaintiff at the time suit was brought; and I think, upon the admissions in the pleadings, without any proof of the contract at all, that the defendant is put to its defense as to any matter relating to the contract, and as to its terms enough is admitted on the face of the pleadings to entitle this plaintiff to recover on the policy of insurance issued by the defendant



company, unless for failure on the part of the assured to pay the premiums. All rights under the policy were forfeited.

Now, as to that there is really but a single issue here. This answer denies that the second premium was paid; it also denies that the second premium was tendered within the period of thirty days after it was due, which, by the terms of the policy, were allowed for the payment. The other pleadings in the case the complaint and the reply, take the case away from any pretense of a tender made and rejected, and the case is narrowed right down to a question of payment, and on that issue, it is my opinion that there is enough evidence to carry the case to the jury to let them decide whether the defendant received the payment or not. While it is true that time is a material part of the contract of life insurance, it is not of such a character that payment after the lapse of the time, or anything that the defendant would not have a right to accept and bind itself by its acceptance. It amounts to just this, that a payment tendered after the lapse of time if refused on the part of the company ends the matter; the company is under no obligation to receive it, but after the time has elapsed it may receive it, and if it does receive it it is a payment. Now, that is the issue in this case, whether there was a payment or not. There is evidence here tending to prove, and enough for the jury to pass on, that the plaintiff in this case parted with her money, and that money has been placed into the hands of a general agent of the company some months before Mr. Nixon died, and I shall submit it to the jury whether they find that evidence sufficient to warrant finding, as a

matter of fact, that the money got into the treasury of the company. The motion is denied.

*Mr. Fox*—We will save an exception, if your Honor please.

*The Court*—An exception is allowed.

Gentlemen of the jury, the admonition I gave you this noon must be observed until this case is finally submitted and decided by you.

We will adjourn until to-morrow morning until half past ten.

TACOMA, Wash., 10:30 A. M.

WEDNESDAY, Sept. 28th, 1892.

All present; proceedings continued pursuant to adjournment.

*Mr. Fox*—If the Court please, we have a motion to present in this case. As a part of the reply filed in this case the plaintiff pleads a law of the State of California, which I read to your Honor yesterday in my argument for non-suit. We have filed a motion to strike from the reply that part of the pleading on the ground that the Circuit Court of the United States takes judicial notice of the laws of the various States, and therefore the law is not properly pleaded.

After argument on the motion.

*The Court*—I will sustain the motion to strike this matter out of the reply, and if there are enough facts—I would not want to state dogmatically now that there are not, but if you can make an argument here upon the facts pleaded and proved, that Mr. Nixon died within the term for which this policy was good, on account of the amount

that he did pay, you can have the benefit of any provision of the laws of California which are applicable to the case. My understanding of the case at the present time, however, is that there is nothing in this point at all. The single issue here to determine is whether the premium was paid or not.

*Mr. Relfe*—Will your Honor give us an exception?

*The Court*—An exception is allowed. Proceed with the defense.

And thereupon defendant offered testimony as follows :

Mr. William M. Fleming, called as a witness for the defendant, and having been duly sworn, testified :

EXAMINATION-IN-CHIEF BY MR. FOX.

Q. Mr. Fleming, where did you reside, and what was your business in and during the month of September, 1890 ?

A. I was Special Agent for The Pacific Mutual, living in Tacoma at the time.

Q. And Special Agent for Tacoma ?

A. Well, Tacoma and the surrounding country.

Q. State whether or not at any time in or during the month of September, 1889, and if so, as nearly as you can, at what time in the month you saw Mr. Thomas Lea Nixon and had any conversation with him in reference to this policy in suit ?

A. It was a few days, I think possibly a week or two after the premium became due ; I was in his office one day talking with him ; I knew the gentleman by sight—

*The Court*—You have not been asked to state the conversation.

Q. Now, you say you did have such a conversation ?

A. Yes.

Q. In his office within a week or two after the premium became due.

A. Yes.

Q. Now, I will ask you to state what that conversation was ?

*Mr. Relfe*—We object to that.

*The Court*—I sustain the objection.

*Mr. Fox*—I now offer to prove by this witness that within the thirty days after the premium fell due, within the days of grace allowed, this witness, an agent of the company, called on Mr. Nixon and had a conversation with him at his office, in which Mr. Nixon stated that he did not intend to pay this premium, but proposed to let the policy lapse.

*Mr. Relfe*—We object on the ground that it is immaterial and irrelevant, and this witness being an Agent of the defendant corporation, and Mr. Nixon being now dead, witness cannot be permitted or allowed to testify to anything that took place between him and Mr. Nixon.

*Mr. Fox*—I will state that witness is not now an Agent of the company.

*Mr. Relfe*—We want to add to that the further objection that the premium has been paid by Mrs. Nixon and accepted by the company .

*The Court*—I will sustain the objection on the ground that I consider the testimony irrelevant.

*Mr. Fox*—We will save an exception.

*The Court*—Exception allowed.

Examination of Mr. Fleming closed.

Mr. Edward C. Frost, re-called on behalf of defendant, testified :

EXAMINATION-IN-CHIEF, BY MR. FOX.

Q. I call your attention to the receipt which was submitted to you yesterday, and which is marked "Plaintiff's Exhibit B," and which is dated, October, 31st, 1890, and ask you from whom you received that money ?

A. From the Paying Teller, of Ladd & Tilton.

Q. State whether or not, you did on the same day, communicate with Mr. Nixon on that subject, and if so, how ?

*Mr. Relfe*—That is objected to, as leading, irrelevant and immaterial.

*The Court*—Objection overruled.

A. I did.

Q. How ?

A. By letter.

Q. Addressed to Mr. Nixon ?

A. Addressed to Mr. Nixon.

*Mr. Fox*—Have you that letter ?

*Mr. Relfe*—I think not. We will waive the production of the original, if you have a copy.

Q. Have you a letter press copy of the original ?

A. Yes, sir.

Q. I will ask you to turn to it.

*Mr. Relfe*—I would like to ask the witness one question : Whatever that letter is, it was written after the receipt of the money by you, as agent of the company, was it not ?

*The Witness*—Yes, sir.

Letter press copy handed to counsel.

Q. This, as I understand you, was written on the same day, and at the same time as the receipt of that money, and is a part of the same transaction ?

A. Yes, sir ; at the immediate time.

*Mr. Relfe*—The question is objected to, as leading and improper, and I move to strike out the answer.

*The Court*—Let it be stricken out.

Q. How long after the receipt of the money was it when you wrote that letter to Mr. Nixon ?

*Mr. Carroll*—That is objected to as immaterial.

*The Court*—I overrule the objection.

A. Immediately.

Q. And when written, what did you do with it ?

A. Mailed it to Mr. Nixon.

Q. Well, how mailed it ?

A. Mailed it through the regular channel, the Post Office.

Q. Postage paid ?

A. Postage paid; yes, sir.

*Mr. Fox*—Counsel waive the production of the original, if your Honor please, and I offer this letter press copy of it in lieu of it, in evidence.

*Mr. Relfe*—Waiving that, we object to the introduction of that letter in evidence, because it is irrelevant, incompetent and immaterial ; because, also, Mr. Nixon is now dead, and this witness is not competent to testify to any transactions or communications between them, and because the contents of the letter undertake to establish (*ex parte*) on the part of the defendant, a different state of facts, which we are unable to meet on account of the death of Mr. Nixon.

Q. I will ask the witness one other question: When you received that money and wrote that letter what knowledge had you as to who had sent the money?

*Mr. Relfe*—We object.

Q. I will put a more direct question. Had you any information that it was sent by Mrs. Nixon and not by Mr. Nixon?

*Mr. Relfe*—We object to that as immaterial and irrelevant.

*The Court*—I overrule the objection.

*Mr. Relfe*—We ask for an exception.

*The Court*—Exception allowed.

A. Yes sir; I had knowledge that Mr. Nixon did not desire to continue the insurance.

*Mr. Relfe*—That is not responsive to the question. We move to strike out the answer.

*The Court*—Let the answer be stricken out.

Q. The question is, did you have any knowledge as to who sent the money?

A. Not direct knowledge; no, sir.

*Mr. Fox*—The receipt shows on its face that it was sent on account of the Thomas Lea Nixon policy.

*The Court*—The objections to the receipt of this letter in evidence are overruled.

*Mr. Relfe*—We ask for an exception.

*The Court*—Exception allowed.

*Mr. Fox*—This being a letter press copy I will ask to read it, and let the reporter write it down; so that we need not follow the copy. It is dated October 31st, 1890. Thomas L. Nixon, Esq., Tacoma, Washington. Dear Sir: I have this day received, through Messrs.

Ladd & Tilton, the sum of \$517.80, which I hold in trust for you. Kindly have the enclosed blank properly filled out by yourself and Dr. McCoy, or Dr. Allen, and return to this office, on which they will be submitted to the company, and if approved I will receive the amount as payment of second annual premium due September 1st and now lapsed for non-payment, and send you company's receipt for same. Yours Very Truly, Edward C. Frost."

Q. What blanks were enclosed in that, Mr. Frost?

A. Two blanks, and one—

*Mr. Relfe*—We object to that as irrelevant and immaterial.

*The Court*—I will overrule the objection.

*Mr. Relfe*—We take an exception.

*The Court*—Exception allowed.

A. One which required Mr. Nixon's own personal statement that he was then in good health and desired to be reinstated; the second was to be filled out by the medical examiner who made the examination on first application of Mr. Nixon, stating that he was then in perfect health, or in as good health as at the time of the application when the company received it.

Q. State whether or not the request contained in that letter as to having those blanks filled out and returned was ever complied with?

A. No, sir. Several attempts were made and they were never complied with.

*Mr. Relfe*—Now, I don't know what he means by "several attempts." That is not responsive, and we move to strike it out.



*Mr. Fox*—We have no objections to striking out that part of the answer.

Q. Was any application ever made through you as the General Agent for the restoration of this policy, and any proof ever offered of good health?

*Mr. Relfe*—We object to that as immaterial and irrelevant.

*The Court*—I will overrule the objection.

*Mr. Relfe*—We ask for an exception.

*The Court*—An exception is allowed.

A. No, sir, no such return was made.

Q. Now, Mr. Frost, please state to the Court and Jury what was done with the money for which you had given that receipt, and with reference to which you wrote Mr. Nixon on that day?

A. It remained with Messrs. Ladd & Tilton, and was afterwards put to the credit of Mrs. Nixon at her call.

Q. And was never paid to the company?

A. No, sir.

Q. Was notice given of that fact to Mrs. Nixon, and if so, when?

A. Notice was given in a registered letter, enclosing the certificate, which was returned unopened—"Refused by Cora E. Nixon."

Q. When was that notice given?

A. That notice was given May the 1st, 1891.

Q. What next, if anything, was done by way of communicating with her on that subject.

*Mr. Relfe*—We object, your Honor, because it occurred after the death of Mr. Nixon, and long after this payment was made, and it is irrelevant and immaterial.

*The Court*—I think this notice in regard to the deposit is relevant. The question that is objected now is a preliminary question.

Q. What next, if anything, was done by way of communicating with her on the subject ?

*Mr. Relfe*—That transaction was the first of May, 1891, half a month after Mr. Nixon's death.

*Mr. Fox*—I will withdraw that question for the present.

Q. I call your attention to this letter, which has been marked "Defendant's Identification 1." Did you receive that letter ?

A. Yes, sir.

Q. About what time ?

A. The 23d of December.

*Mr. Fox*—This is a letter, if your Honor please, which Mrs. Nixon identified yesterday as one written by herself, and sent by herself, to the witness. I now offer it in evidence.

Letter referred to received in evidence, and marked "Defendant's Exhibit 1."

Defendant's Exhibit 1 read to the Jury by Mr. Fox.

Q. Now, did you respond to that letter which has just been read ?

A. Yes, sir.

Q. When ?

A. This letter was replied to on the 26th day of December, 1890.

Q. Is this letter I hand you the one you refer to ?

A. Yes, sir.

*Mr. Fox*—We offer the letter in evidence.

*Mr. Relfe*—We object to it as irrelevant and immaterial.

*The Court*—I overrule the objection.

*Mr. Relfe*—We ask for an exception.

*The Court*—Exception allowed.

Letter referred to received in evidence, and marked “Defendant’s Exhibit 2.”

Defendant’s Exhibit 2 read to the Jury by Mr. Fox.

Q. Now, I will ask you, Mr. Fox, what response Mrs. Nixon made, if any, and when?

A. No response to that letter, sir.

Q. No response from her until after his death?

A. No response until after his death, yes.

Q. Now, what in the meantime, then after writing that letter, was done with the money?

A. It remained still in the bank, sir.

Q. And after his death, did you give her any notice then in regard to it?

A. Yes, sir; the money was———

*Mr. Relfe*—We object. It seems to me that counsel ought to refrain from leading the witness.

*The Court*—I will overrule the objection.

A. The money was deposited to the order of Mrs. Nixon, at Ladd & Tilton’s Bank, and instructions were sent her to that effect.

Q. By whom?

A. By myself.

Q. Is that in writing?

A. Yes, sir.

Q Can you turn to that and show us a copy of it, so that we can get the date ?

A. Here is the letter itself, with the certificate.

Q. That is the one you referred to a moment ago as having been sent by registered letter, and returned unopened ?

A. Yes, sir.

Q. I understand you that this was the next communication from you after that letter ?

A. Yes, sir.

Q. Which you wrote in response to hers, of the 22d?

A. Yes, sir.

*Mr. Fox*—We offer it in evidence.

*Mr. Relfe*—We object to it as incompetent, irrelevant and immaterial, it never having been received by Mrs. Nixon, or by any body else, as the witness has testified that it was returned to him unopened.

*Mr. Fox*—Do you admit that that is Mrs. Nixon's signature to the word "Refused" on the envelope ?

*Mr. Relfe*—We think it is ; it looks like it, yes, sir.

*Mr. Fox*—I now offer, if your Honor please, the letter of May 1st, 1891, the enclosed certificate of deposit and the envelope in which it was enclosed with original endorsements, the signature of Mrs. Nixon on the envelope being admitted.

*Mr. Relfe*—We make the objection I stated a moment ago.

*The Court*—I will overrule the objection.

*Mr. Relfe*—We except.

*The Court*—Exception allowed.

Papers referred to, letter, certificate of deposit and

envelope received in evidence, and marked "Defendant's Exhibit "3," and read to the jury by Mr. Fox.

Following is an exact copy of the certificate of deposit just referred to, made by order of the Court, and substituted for the original :

"Ladd & Tilton, Bankers, No. 73,673.

X 517 X Portland, Oregon, May 1st, 1891.

E. C. Frost has deposited in this bank, five hundred seventeen .80 dollars, payable to Mrs. T. L. Nixon, \$517.80, or order, upon presentation of this certificate properly endorsed.

N. C. Strong, Teller.

LADD & TILTON.  
Not subject to check."

Q. It seems you wrote a letter prior to this, in April?

A. Yes, sir.

Q. Will you turn to that letter?

A. I have not got a copy of it here. This book does not run as far as that.

*Mr. Fox*—I think I have a copy of it here, but there is no signature to it.

Q. I will ask you if the paper I hand you is a carbon copy of the letter you sent?

*Mr. Carroll*—We have the original of that letter here. Letter referred to by Mr. Carroll handed to witness.

Q. Is that the letter you sent?

A. That is the one I sent; yes, sir.

Q. That is the one you sent the day before you sent the registered letter?

A. Yes, sir.

*Mr. Fox*—I will offer that letter in evidence.

Letter received in evidence and marked "Defendant's Exhibit 4."

Q. Now, where is that money?

A. It is in Ladd & Tilton's bank.

Q. Still on deposit, as you left it?

A. Still on deposit; yes, sir.

*Mr. Fox*—The witness with you, gentlemen.

*Mr. Relfe*—It is a little out of order, your Honor, but I will now offer in evidence the letter of October 23d, with the envelope, which is addressed to Thomas L. Nixon, Esq., which we offered yesterday.

*The Court*—It will be admitted.

Letter referred to received in evidence, and marked "Plaintiff's Exhibit C," and envelope, the same.

Exhibit C, read to the jury by Mr. Relfe.

CROSS-EXAMINATION BY MR. RELFE.

Q. Mr. Frost, did Mrs. Nixon authorize you to deposit that money in the bank?

A. No, sir.

Q. Did Mr. Nixon?

A. No, sir.

Q. You did that on your own motion, then?

A. Yes, sir.

Q. You received that money on the 31st of October, 1890?

A. Yes, sir.

Q. And signed that receipt, which is Exhibit B?

A. Yes, sir.

Q. When you received that money you knew what it was sent for, did you not?

A. Yes, sir.

Q. You knew it was sent to be applied as per the telegram, in payment of Mr. Nixon's premium on that policy?

A. Yes, sir.

Q. Did Mr. Nixon or Mrs. Nixon at any time conceive or assent to your acting as trustee for them and holding that money?

*Mr. Fox*—We object to that as irrelevant, and immaterial; and the correspondence shows that he never had it in that way.

*The Court*—I think the question is calculated to elicit from the witness a legal argument, not asking him what was said and done as a matter of fact, but whether they consented to his acting as a trustee or not, which is a legal conclusion that lawyers might disagree about.

*Mr. Relfe*—I asked him whether they at any time or in any way assented to that trusteeship of his?

*Mr. Fox*—I object to that as incompetent and inadmissible and tending to draw a conclusion.

*The Court*—I sustain the objection.

*Mr. Relfe*—We except.

*The Court*—Exception allowed.

Q. Did either of them ever write to you or tell you that you might hold that money as trustee?

*Mr. Fox*—I object to that. What response did they make to the letter in which you informed them that you held it in trust, is, I think the question.

*The Court*—I overrule the objection.

*Mr. Fox*—We ask for an exception.

*The Court*—Exception allowed.

Question read: Did either of them ever write to you or tell you that you might hold that money as trustee?

A. They wrote to me, but they did not tell me that I might hold it as trustee.

Q. Now, answer the question, Mr. Frost?

A. Well, they did not tell me that I might hold it as trustee. You asked me "Did they write to me?" Yes, they did but they did not tell me I might hold it as trustee.

Q. Did they ever, directly or indirectly, authorize you to do anything with that money except to apply it on that premium?

*Mr. Fox*—That is objected to as incompetent and immaterial.

*The Court*—I sustain the objection.

Q. Now, you say, Mr. Frost, in answer to the counsel's questions, that the money was received by you on the 31st, and then deposited on that day in the bank. Am I correct in my recollection?

A. Yes, sir.

Q. In Ladd & Tilton's bank?

A. Yes, sir.

Q. Deposited by you?

A. Yes, sir.

Q. And to whose credit?

A. It was deposited to the credit of my account there.

Q. To the credit of your account as general agent?

A. Yes.



Q. Then it remained in that condition until the date of the registered letter, did it not?

A. Yes, sir.

Q. At the time you undertook to transmit it by registry?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. It remained in that condition until the date of that registered letter?

A. Yes, sir.

Q. And then you undertook to send it to her by a registered letter and she declined to receive it, and on the 30th of April you deposited it to her credit?

A. Yes, sir.

Q. The 30th of April, 1891?

A. Yes, sir.

Q. That was the first time that money was ever put to her credit in the Bank of Portland, was it not?

A. Yes, sir.

Q. That was after Mr. Nixon's death?

A. Yes, sir.

Q. Do you remember your testimony a moment ago, Mr. Frost, wherein you spoke of several attempts to do something? I will have to ask you in that way, as I do not remember, myself exactly. Do you remember that expression of yours?

A. Yes.

Q. What did you mean by that? Did you mean that you had made several attempts, or that Mr. Nixon had made several attempts?

A. That several attempts had been made. Dr. McCoy had sent——

Q. (Interrupting) I want to know whether the expression that several attempts had been made referred to your own acts in trying to get him a health certificate, or to Mr. Nixon's acts ?

A. Well, it was to neither particularly.

Q. How long have you been General Agent for The Pacific Mutual Life ?

A. A little over four years.

Q. From now, you mean ?

A. Yes, sir; it was in June, 1888, that, I believe, I first took the agency.

Q. What was your territory ?

A. At what time, sir ?

Q. Well, as General Agent, I mean ?

A. Well, at what time ?

Q. Well, during that period.

A. First I had the general agency for part of Oregon, then it was increased to Oregon and this Puget Sound District; finally I had the agency for the whole of Washington and Oregon.

Q. What was the extent of your jurisdiction in September and October, 1890 ?

A. Oregon and Puget Sound.

Q. What literature did you keep—what company literature did you keep in your office in the general transaction of your business; or did you at that time as General Agent.

*Mr. Fox*—That is objected to as immaterial and irrelevant.

*The Court*—Do you propose to connect it and make it relevant to something he has testified to in chief?

*Mr. Relfe*—I propose to show its relevancy by reference to his scope of authority as General Agent.

*The Witness*—May I be allowed to make a remark in regard to the general agency?

*The Court*—Not at present, no, sir. I will sustain the objection.

*Mr. Relfe*—We except.

*The Court*—An exception is allowed.

Q. You collected and receipted for the first premium in this case, did you not?

A. Yes, sir.

Q. Did your business as General Agent include the delivery of the policies after the contract had been agreed upon?

A. Yes, sir.

Q. And the giving of the premium receipts?

A. Yes, sir.

Q. And collecting the premiums?

A. Yes, sir.

Q. Did it include also adjusting death losses, or is that another department?

*Mr. Fox*—It seems to me that this is not relevant, and that it is not proper cross-examination, and I object on those grounds.

*The Court*—I will sustain the objection.

*Mr. Relfe*—We except.

*The Court*—Exception allowed.

Q. Mr. Frost, when you received the first premium

from Mr. Nixon, of \$517.80, were you then at Portland?

A. No, sir.

Q. Where ?

A. Here.

Q. Were you General Agent then ?

A. General Agent; yes, sir.

Q. Well, what did you do with that premium ?

*Mr. Fox*—I object; it is irrelevant and immaterial.

*The Court*—I sustain the objection.

*Mr. Relfe*—We will except. I think this is competent to show his course of business.

*The Court*—Exception allowed.

Q. In September and October, 1890, were you in the habit of receiving premiums on policies ?

A. Yes, sir.

Q. Within your jurisdiction ?

A. Yes, sir.

Q. What did you do with those moneys, including those premiums ?

*Mr. Fox*—That is objected to as immaterial,

*The Court*—I sustain the objection.

*Mr. Relfe*—We except.

*The Court*—Exception allowed.

Q. I will ask you the further question, whether you deposited them in bank to your account as General Agent.

*Mr. Fox*—We object on the same grounds.

*The Court*—I sustain the objection.

*Mr. Relfe*—We except.

*The Court*—Exception allowed.

Q. Did you have periodical settlements with the company, as to the business transacted for it, and the moneys received and disbursed ?

*Mr. Fox*—We object to that ; it is irrelevant and immaterial.

*The Court*—I overrule the objection.

*Mr. Fox*—We ask an exception.

*The Court*—Exception allowed.

A. I had.

Q. What are those periods—quarterly or monthly ?

A. Monthly.

Q. Then you struck your balance, and remitted the balance in your hands to the company, did you, for those monthly periods ?

A. No, sir ; not as I understand your question.

Question read—“Then you struck your balance, and remitted the balance in your hands of the company, did you, for those monthly periods ?”

A. No, sir.

Q. What did you do then ?

A. I make them a statement and remit them the balance due them.

Q. That is what I ask you.

A. I beg pardon. I understand you the balance of money that is in the bank.

Q. No, of course, you would not remit anything of your own ?

A. No, sir.

Q. That is what I meant, that you remitted them

the balance shown to be due them as general agent, receipts over disbursements?

A. Yes, sir.

Y. Did you deliver this policy to Mr. Nixon, or was it done through your office?

A. Yes, it was done through my office; I think I done it personally.

Q. How?

A. To the best of my recollection I did it personally.

Q. When and where?

*Mr. Fox*—That is objected to as irrelevant, and further that there is no dispute about that.

*The Court*—I sustain the objection.

*Mr. Relfe*—I would like to say that I asked the question for this purpose only: it is pleaded here, while it is a legal conclusion, that this is a California contract, that may or may not cut any figure in this case; I do not know as to that, but we are entitled to find out where the policy was delivered, and it was with that view that I asked the question.

*The Court*—I will sustain the objection on the ground that it is not cross-examination. It may be that you have a right to prove that fact if you call your own witnesses for the purpose.

*Mr. Relfe*—That is all.

RE-DIRECT EXAMINATION BY MR. FOX.

Q. In your reports and settlements with the company was this premium, this money, received on the 31st day of October, 1890, ever accounted for to the company in any way?

*Mr. Relfe*—We object to that as incompetent, irrelevant and immaterial.

*The Court*—I will overrule the objection.

*Mr. Relfe*—We except.

*The Court*—Exception allowed.

A. No, sir, it was not.

Q. If I understand you correctly, it was held by you from the 31st day of October, when it was paid and deposited in bank to the credit of your account, and staid in that shape until the 31st of April, 1891, at the time of his death, under the correspondence which you have had with Mr. Nixon and Mrs. Nixon, and which has already been offered in evidence?

*Mr. Relfe*—We object to the form of the question.

*The Court*—Objection overruled.

A. Yes, sir.

*Mr. Fox*—That is all.

*Mr. Relfe*—That is all.

Examination of Mr. Frost recalled closed.

*Mr. Fox*—I now offer in evidence, if your Honor please, the application for this policy of insurance, which was identified by Mrs. Nixon yesterday. I wish to have it marked as an exhibit and considered as read to the jury.

Paper referred to received in evidence and marked "Defendant's Exhibit 5."

*Mr. Fox*—I have a certified copy of Exhibit 5 here, which I desire to substitute in place of the original, and withdraw the original from the record.

*The Court*—Very well.

*Mr. Fox*—I believe that is the defendant's case, your Honor.

Defendant rests.

*The Court*.—We will now take a recess until 1:45 this afternoon.

Gentlemen of the Jury, keep in mind the admonition I gave you when you were first allowed to separate.

TACOMA, Wash., 1:45 P. M.

September, 28, 1892.

All present proceedings continued, pursuant to adjournment.

*The Court*—Do you wish to offer any testimony in rebuttal.

*Mr. Relfe*—We have no further testimony, your Honor.

*The Court*—Proceed with the argument of the case to the jury.

Case argued to the jury by Mr. Carroll for the plaintiff, and Mr. Fogg and Mr. Fox for the defendant, Mr. Relfe closing for the plaintiff.

Before the commencement of the argument to the jury, Mr. Fox, on behalf of the defendant, submitted :

Requests of defendant to charge jury, as follows :

1. This is an action upon a contract of life insurance, and brought for the purpose of recovering the amount of the insurance named in the policy. The contract is in writing, and upon its face shows that it is in two parts, to-wit: One part known as, and called Application for Life Insurance, and the other part being known as, and called a Policy of Life Insurance. There is no dispute in this cause as to the fact of a policy of life insurance having



been issued and granted, insuring the life of Thomas Lea Nixon, in the sum of ten thousand dollars, nor is it disputed that said Thomas Lea Nixon died on the 16th day of April, 1891, and that his widow, the plaintiff in this cause, is entitled to recover the amount of the insurance, provided the contract of insurance was in force at the date of his death.

(Note by the Court : "Given.")

2. The application for insurance was written and signed in this State, and was made by said Thomas Lea Nixon, dated August, 15th, 1889, and provided that the policy, if one should be issued thereon, should bear date on and run from the 1st day of September, 1889. This application was addressed to the defendant, The Pacific Mutual Life Insurance Company of California, a corporation organized and existing under the laws of the State of California, and having its principal place of business in San Francisco, in that State ; and the application provided upon its face, that if the proposition for life insurance therein contained, should be accepted, and a policy issued thereon, the contract of insurance should be held and construed at all times and places to have been made in the City of San Francisco, in the State of California. The application was accepted, and the policy issued and made in San Francisco, in the State of California, and bore date, September, 1st, 1889, and by the terms of the contract itself became and was a California contract, and the rights of the parties thereunder, were governed by the terms of the contract and the laws of the State of California.

(Note by the Court: "Refused.")

3. The contract further provides upon its face, that if a policy should be issued upon the application, it should become null and void, if the premium thereon was not paid as provided therein, and should such policy become null and void by reason of the non-payment of the premium, all payments previously made should be forfeited to the company, except as in the policy otherwise provided. This provision of the contract was, and is, expressly stated and declared in the first part thereof, to-wit: in the application made and signed by the insured, Thomas Lea Nixon.

(Note by the Court: "Given.")

4. It was further provided in this application for insurance, and became a part of the contract, that all the declarations, agreements and warranties therein contained should constitute a part of the contract and that the application with its declarations, agreements and warranties was offered as a consideration for the policy applied for, the policy itself expressing on its face that it was made in consideration of the representations made in the application therefore and the agreements therein contained, which application is made a part of the contract; and of said sum of five hundred seventeen and .80, and the annual payment of a like amount to be paid on or before 12 o'clock noon, on the 1st day of September in every year during the continuance of the policy.

(Note by the Court: "Refused.")

5. It was further provided in and upon the face of said policy that after the payment of the first premium, a grace of thirty days for the payment of the premium

should be allowed, but only in case the same is paid during the lifetime of the insured aforesaid; also, that no alteration or waiver of the conditions of the policy should be valid unless made at the office of said company in San Francisco, and signed by the President or Vice-President, Secretary or Assistant Secretary.

(Note by the Court: "Given.")

6. It is admitted that the contract of insurance was duly made and executed, containing all of the provisions hereinbefore stated; that the first premium thereon was paid and the policy delivered, and the only issue in this case is as to whether or not the second premium which fell due on the 1st day of September, 1890, was paid according to the terms of the policy or contract.

(Note by the Court. "Refused.")

7. If you should find from the evidence that it was so paid and that the insured, Thomas Lea Nixon, complied with the terms and conditions of the policy in that behalf on his part, then you will find for the plaintiff; but, on the other hand, if you find from the evidence that the premium which fell due on the 1st day of September, 1890, was not paid on or before 12 o'clock of that day, or within the thirty days grace, to-wit: The next succeeding thirty days thereafter, according to the terms of the policy and within the lifetime of the insured, then it is your duty to find for the defendant.

(Note by the Court: "Refused.")

8. I charge you that under the law of the contract, to-wit: The statutes and the laws of California, the provision made in this contract for prompt payment of the

premium when due was a warranty that the premium should be so paid and that a failure of this provision rendered the contract void under the statutes of California, as well as under the provisions of its own terms found on its face. This provision was one which the parties had a right to make, and having made it, it became of the essence of the contract and was binding upon the contracting parties and upon the beneficiary under the policy. The time within which the payment was to be made was also of the essence of the contract and sickness or disability would not constitute an excuse for non-payment which operated to defeat the lapse of the policy, or prevent it becoming void for non-payment.

(Note by the Court—"Refused.")

9. If there was a failure to pay this premium within the time fixed by the contract, it defeats the plaintiff's right to recover in this action; the policy lapsed and became void by reason of that non-payment, and no promise of an agent to accept the premium after the time when it should have been so paid, would operate to renew the policy; even the act of a person holding an agency of this plaintiff in receiving, receipting for and temporarily retaining the amount of the premium past due, and for the non-payment of which the policy had lapsed by its own terms, would not operate as a waiver so as to renew the policy or entitle the plaintiff to recover thereon.

(Note by the Court—"Refused.")

At the close of the argument the Court charged the Jury as follows :

*The Court*—Gentlemen of the Jury, this is an action upon a contract of life insurance, and brought for the

purpose of recovering the amount of insurance named in the policy. The contract is in writing, and upon its face shows that it is in two parts, to-wit: One part known as and called "Application for Life Insurance," the other part being known as and called "Policy of Life Insurance." There is no dispute in this cause as to the fact of a policy of life insurance having been issued and granted, insuring the life of Thomas Lea Nixon in the sum of ten thousand dollars; nor is it disputed that said Thomas Lea Nixon died on the 16th day of April, 1891, and that his widow, the plaintiff in this cause, is entitled to recover the amount of insurance, provided the contract of life insurance was in force at the date of his death. The contract provides upon its face that if a policy should be issued on the application it should become null and void if the premium thereon was not paid as provided therein, and should such policy become null and void by reason of the non-payment of any premium, all payments previously made should be forfeited to the company, except as in the policy otherwise provided. This provision of the contract was and is expressly stated and declared in the first part hereof, to-wit: in the application made and signed by the insured, Thomas Lea Nixon. It was further provided in and upon the face of said policy, that after the payment of the first premium, a grace of thirty days for the payment of the premium should be allowed, but only in case the same is paid during the lifetime of the insured. Also that no alteration or waiver of the conditions of the policy should be valid, unless made at the office of said company in San Francisco, and signed by the President or Vice-President, Secretary or Assistant Secretary. It

is admitted that the contract of life insurance was duly made and executed, containing all the provisions herein before stated; that the first premium thereon was paid and the policy delivered, and the only issue in this case is as to whether or not the second premium, which fell due on the first day of September, 1890, was paid. That, gentlemen of the jury, is the disputed question between the parties to this case — whether the second premium was paid or not. It is a question which you have to decide, and as you decide it, one way or the other, your verdict will be for or against the plaintiff in the case. You are the exclusive judges of every question of fact, and you are to determine the case, decide this question and determine the case, according as you find the facts to be from the evidence under the instructions of the Court as to the law which is to be applied to the facts as you find them.

Now, in determining this main question of fact you are to keep in mind that the burden rests upon the plaintiff to prove that she did pay this second premium, and the fact of payment cannot be found from mere inferences, but it must appear from the testimony; and you must find from a fair preponderance of the evidence in her favor, that she actually did pay the money, in order to warrant a verdict for the plaintiff. She cannot hold this company liable upon any promise of an agent of the company to accept anything except actual cash, the full amount due within the stipulated time of the contract; but under the issues as they are framed she must prove that she actually paid the money and that the company got it.

Under the terms of the contract and the law of the case the time when the money was due is a material part of the contract which the company has a right to insist upon; and no tender or offer of payment after the lapse of that time would place her in the same situation that actual payment would place her in, provided the tender was refused or not accepted. But an actual payment of the money, so that the full amount was received by the company, when paid by the plaintiff in the case, is a payment of that premium; and if received and retained by the company would be exactly equivalent to payment within the period provided within the contract when it should have been paid. In other words, a payment is as much a payment made after the date when it was due and payable, provided it was received and retained by the company, as if it had been made before that time.

Now, Mr. Frost appears by the pleadings and the evidence to have been acting for this company, and whatever he did within the scope of his authority to represent the company will be regarded as the act of the company.

Acts of his, unauthorized and outside of the scope of his authority as an agent of the company are not binding upon the company, unless he assumes to act for the company and the company knew of his action and received and retained the benefit of his action and failed promptly to give notice to the plaintiff that his act was not indorsed or approved by the company. If he received money from the plaintiff for the company which he was not authorized at the time to receive, and yet retained it and applied it to the use of the company, with the knowledge of his superior officers in the company, and if they failed to

notify the plaintiff that the payment was not approved or received by the company, and failed to return the money, if they received it, then it would be, by reason of the failure of the company to repudiate his act promptly, equivalent to an authorized act and may be regarded as the ratification of the action of an agent of the company in a matter in which he was previously unauthorized; and the action of one assuming to be an agent and acting for another, if ratified by the principal, becomes just as binding and has the same effect as if it had been an authorized act at the time.

If the plaintiff sent the amount of the second premium on this policy to Mr. Frost at Portland, to be applied as a payment of the second premium on this life insurance policy, Mr. Frost would have no right to receive and retain the money for any other purpose than as a payment on the policy as the second premium, according to the instructions sent with the money. If, however, being unauthorized, he simply retained the money temporarily and promptly notified the plaintiff that it had not been applied in payment of the premium, the company would not be bound by his acts in receiving the money. If, however, he retained the money, after being requested or notified by the plaintiff to return it, then his assumption in the matter of acting as trustee or agent for the plaintiff would be unwarranted, and in so far as he was acting with the knowledge of the managing officers of the company, would be binding upon them in the same manner as where he acted for the company in any other respect.

Under the peculiar conditions of this case it is one in



which promptness and actual good faith was required on both sides. It was required of Mr. Frost, if he did not intend to apply the money he received in payment of this premium to make the policy good that he should give prompt notice; if he did not give prompt notice it was incumbent upon Mr. Nixon or Mrs. Nixon to act definitely in the matter of furnishing the additional certificates that were required, or notify him that they could not or would not furnish them, and call for their money to be returned, and if they did so notify Mr. Frost and ask for the return of the money, and it was yet retained by Mr. Frost, with the knowledge of his superior officers in the company, then it cannot be insisted that he was acting as a trustee or agent for the plaintiff in holding the money, but it will be regarded as money received and retained by the company and bind them to make an application of it as a payment in accordance with the original intention and instruction of the plaintiff in sending it.

Now, it is for you to take into account the testimony, the letters and correspondence, which have been introduced, and decide what effect to give to this evidence, and determine whether the company received this money or not, and whether it has retained it after it should have returned it, in case the company declined to receive it as payment; and as you decide that question you will make up your verdict for or against the plaintiff.

Gentlemen of the jury, in case you find a verdict for the plaintiff she will be entitled to the amount of the policy, ten thousand dollars, with interest to be computed at the rate of seven per cent per annum from the time

when the company received information that Mr. Nixon was dead,—from the time that you find the company had notice of his death. If you find a verdict for the defendant you have no question to consider as to the amount, you simply find for the defendant.

I have prepared the form of a verdict for you. It is not complete, and after you have decided the case you will complete it by the adoption of one or the other of the forms I have submitted on this separate slip of paper. It requires to be signed by whoever you select from your number to be foreman of the jury. If the Court is not in session at the time you agree upon your verdict you will have the verdict completed, signed by your foreman, placed in an envelope and sealed up and leave it in the possession of your foreman. You may then separate, but come together again when the Court next convenes so as to be all present when the verdict is returned into Court. In case you do separate before returning the verdict into Court you will not communicate to any one or allow any one to make inquiries of you as to the result of the case, but let your announcement of your verdict be first made in Court when the verdict is read.

You may retire with the bailiff, gentlemen.

The jury having retired, thereupon.

*Mr. Relfe*—If the Court please, we desire to save an exception to that portion of the charge which declares that the burden of proof of payment is on the plaintiff.

*The Court*—Exception allowed.

STATE OF WASHINGTON, }  
 County of Pierce. } ss.

I, Charles E. Eaton, stenographer, do hereby certify that I attended at the trial of the above entitled action, as stenographer, having been duly sworn in as such, and reported in shorthand the testimony and proceedings during said trial ; that the foregoing, consisting of sixty-three (63) typewritten pages, is a full, true and correct transcript of my notes taken on said trial; that said transcript embraces and contains a full and complete report of the testimony produced and proceedings had on said trial, together with the objections of counsel, the rulings of the Court thereon, and exceptions taken and allowed thereto, and the charge of the Court to the jury.

In witness whereof, I have hereunto set my hand at the City of Tacoma, in the County and State aforesaid, this 3rd day of October, A. D. 1892.

C. B. EATON.

And, afterwards, to-wit: On the 13th day of December, 1892, there was duly filed in said Court, in said cause, the copy of the Exhibit No. 3, of the Defendant, substituted for the original, in the words and figures as follows, to-wit:

TACOMA, Oct. 6, 1892.

Rec'd of C. B. Eaton the certificate of deposit introduced in evidence, in case of Cora E. Nixon vs. Pacific Mutual Life Ins. Co., in the Circuit Court of the U. S.

Said certificate being dated, May 1, 1891, for \$517.80, to E. C. Frost, and issued by Ladd & Tilton of Portland.

DOOLITTLE & FOGG.

Same being Defendant's Exhibit 3.

Certificate of Deposit.

Ladd & Tilton, Bankers, No. 73,673.

X 517 X. PORTLAND, Oregon, May 1, 1891.

E. C. Frost has deposited in this Bank, five hundred seventeen .80 dollars, payable to Mrs. T. L. Nixon, \$517.80, or order, upon presentation of this certificate, properly endorsed.

N. C. Strong, Teller. LADD & TILTON.

Not subject to check.

I hereby certify, that the above is an exact copy of Defendant's Exhibit 3, offered and received in evidence in case of Nixon vs. Pacific Mutual Life Insurance Company.

C. B. EATON,  
Stenographer.

And, afterwards, to-wit : On the 28th day of December, 1892, there was duly filed in said Court, in said cause, The Assignment of Errors of the Defendant, in the words and figures as follows, to-wit :

*In the United States Circuit Court of Appeals, for the Ninth District.*

CORA E. NIXON,  
*Plaintiff,*

vs.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,  
*Defendant.*

**Assignment of Errors.**

Comes now, the defendant in the above entitled action,

by its attorneys, and says: that in the record and proceedings in the above entitled action, there is manifest error, in this:

### I.

The Court erred in admitting evidence the policy of insurance in this case, for the reason, that the contract of insurance herein sued on, was in two parts, neither of which disclosed the entire contract, but both parts are necessary, and required to show the entire contract.

### II.

The Court erred in not sustaining defendant's motion for a non-suit made at the close of the plaintiff's evidence, for the reason that there was no evidence then in the record upon which the jury could find a verdict for plaintiff.

### III.

The Court erred in sustaining objections to the questions propounded to the witness for the defendant, William M. Fleming; as to a conversation between him and Thomas Lea Nixon.

### IV.

The Court erred in refusing to permit the defendant to prove by said witness that within thirty days after the premium fell due, within the days of grace allowed, the witness, then an agent of the company, called on Mr. Nixon and had a conference with him in his office, in which Mr. Nixon stated that he did not intend to pay the premium, but proposed to let the policy lapse.

## V.

The Court erred in permitting plaintiff's counsel to introduce in evidence the alleged letter of date October 23, 1890, purported to have been written by Edward C. Frost to Thomas Lea Nixon, for the reason that the same was in no wise identified, and, on the contrary, was in all respects expressly repudiated by the said Edward C. Frost, the person who purported to have written the same.

## VI.

The Court erred in permitting plaintiff's counsel to make statements in his closing argument to the jury, not warranted by the evidence and calculated to prejudice and inflame the minds of the jury against the defendant, and to appeal to the sympathy of the jury on behalf of the plaintiff, which remarks were calculated to and did prevent defendant from having a fair trial.

## VII.

The Court erred in refusing to give to the jury the following instructions as prayed by defendant:

“ The application for insurance was written and signed in this State and was made by said Thomas Lea Nixon, dated August 15, 1889, and provided that the policy, if one should be issued thereon, should bear date on and run from the 1st day of September, 1889. This application was addressed to the defendant, The Pacific Mutual Life Insurance Company of California, a corporation organized and existing under the laws of the State of California, and having its principal place of business in

San Francisco, in that State; and the application provided upon its face that if the propositions for life insurance therein contained should be accepted and a policy issued thereon, the contract of insurance should be held and construed at all times and places to have been made in the City of San Francisco, in the State of California. The application was accepted and the policy issued and made in San Francisco, in the State of California, and bore date September 1st, 1889, and by the terms of the contract itself became and was a California contract, and the rights of the parties thereunder were governed by the terms of the contract and the laws of the State of California.”

#### VIII.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

“ It was further provided in this application for insurance, and became a part of the contract, that all the declarations, agreements and warranties therein contained shall constitute a part of the contract, and that the application with its declarations, agreements and warranties was offered as a consideration for the policy applied for, the policy itself expressing on its face that it was made in consideration of the representations made in the application therefor, and the agreements therein contained, which application is made a part of the contract; and of said sum of five hundred seventeen and 80-100 and the annual payment of a like amount to be paid on or before 12 o'clock noon, on the 1st day of September in every year during the continuance of the policy.”

## IX.

The Court erred in refusing to give to the Jury the following instruction, as prayed by defendant:—

“ It is admitted that the contract of insurance was duly made and executed, containing all of the provisions hereinbefore stated; that the first premium thereon was paid and the policy delivered, and the only issue in this case is as to whether or not the second premium, which fell due on the first day of September, 1890, was paid according to the terms of the policy or contract.”

## X.

The Court erred in refusing to give to the Jury the following instruction, as prayed by defendant:—

“ If you should find from the evidence that it was so paid, and that the insured, Thomas Lea Nixon, complied with the terms and conditions of the policy on that behalf on his part, then you will find for the plaintiff; but on the other hand, if you find from the evidence that the premium which fell due on the 1st day of September, 1890, was not paid on or before 12 o'clock of that day, or within the thirty days grace, to-wit: the next succeeding thirty days thereafter, according to the terms of the policy and within the lifetime of the insured, then it is your duty to find for the defendant.”

## XI.

The Court erred in refusing to give to the Jury the following instructions as prayed by the defendant:—

“ I charge you that under the law of the contract, to-wit: the Statutes and the Laws of California, the provision



made in this contract for prompt payment of the premium when due was a warranty that the premium should be so paid, and that a failure of this provision rendered the contract void under the Statutes of California, as well as under the provisions of its own terms found on its face. This provision was one which the parties had a right to make, and having made it, it became of the essence of the contract, and was binding upon the contracting parties and upon the beneficiary under the policy. The time within which the payment was to be made was also of the essence of the contract, and sickness or disability would not constitute an excuse for non-payment which operated to defeat the lapse of the policy, or prevent it becoming void for non-payment."

## XII.

The Court erred in refusing to give to the Jury the following instruction, as prayed by defendant:—

"If there was a failure to pay this premium within the time fixed by the contract it defeats the plaintiff's right to recover in this action; the policy lapsed and became void by reason of that non-payment, and no promise of an agent to accept the premium after the time when it should have been so paid, would operate to renew the policy, even the act of a person holding an agency of this plaintiff in receiving, receipting for and temporarily retaining the amount of the premium, past due and for the non-payment of which the policy had lapsed by its own terms, would not operate as a waiver so as to renew the policy or entitle the plaintiff to recover thereon."

## XIII.

The Court erred in charging and instructing the Jury as follows, to-wit :

“And the only issue in this case is, as to whether or not the second premium, which fell due on the first day of September, 1890, was paid.”

And the Court further charged and instructed the Jury: “She cannot hold this company liable on any promise of an agent of the company to accept anything except actual cash in full payment due within the time stipulated in the contract, but under the issues as they are formed she must prove that she actually paid the money and that the company got it.”

And the Court further charged and instructed the jury that “under the terms of the contract and the law of the case, the time when the money was due is a material part of the contract which the company had a right to insist upon and no tender of payment or offer of payment after the lapse of the time would place her in the same situation that actual payment would place her in, provided the tender was refused or not accepted.”

And thereupon the Court further instructed and charged the jury as follows:—“but an actual payment of the money so that the full amount was received by the company when paid by the plaintiff in this case is a payment of that premium; and if received and retained by the company would be exactly equivalent to payment within the period provided in the contract when it should have been paid. In other words, a payment is as much a payment made after the date when it was due and pay-

able, provided it was received and retained by the company, as if it had been made before that time.”

To which charge of the Court to the jury the defendant then and there duly excepted, and exception allowed by the Court.

#### XIV.

The Court erred in charging and instructing the jury as follows, to-wit: “Now, Mr. Frost, appears by the pleadings and the evidence to have been acting for this company, and whatever he did within the scope of his authority to represent the company will be regarded as the act of the company. Acts of his, unauthorized and outside of the scope of his authority as an agent of the company, are not binding upon the company, unless he assumed to act for the company and the company knew of his action and received and retained the benefit of his action, and failed promptly to give notice to the plaintiff that his act was not indorsed or approved by the company.”

To which ruling the defendant then and there duly excepted, and exception allowed by the Court.

#### XV.

The Court erred in charging and instructing the jury as follows: “If he received money from the plaintiff for the company which he was not authorized at the time to receive, and yet retained it and applied it to the use of the company, with the knowledge of his superior officers in the company, and if they failed to notify the plaintiff that the payment was not approved or received by the company, and failed to return the money, if they received

it, then it would be by reason of the failure of the company to repudiate his act promptly, equivalent to an authorized act and be regarded as the ratification of the action of the agent of the company in a matter in which he was previously unauthorized."

To which charge of the Court to the said jury, the defendant then and there excepted and exception allowed by the Court.

## XVI

The Court erred in charging and instructing the jury as follows, to-wit: "If the plaintiff sent the amount of the second premium on this policy to Mr. Frost at Portland, to be applied as a payment of the second premium on this life insurance policy, Mr. Frost would have no right to receive and retain the money for any other purpose than as a payment on the policy as the second premium, according to the instructions sent with the money. If however, being unauthorized, he simply retained the money temporarily and promptly notified the plaintiff that it had not been applied in payment of the premium the company would not be bound by his act in receiving the money. If, however, he retained the money, after being requested, or notified by the plaintiff to return it, then his assumption in the matter of acting as trustee or agent of the plaintiff would be unwarranted, and, as far as he was acting with the knowledge of the managing officers of the company, would be binding upon them in the same manner as where he acted for the company in any other respect."

To which instruction and charge of the Court to the

jury, the defendant then and there duly excepted and exception allowed by the Court.

## XVII.

The Court erred in charging and instructing the jury, as follows :

“ Under the particular condition of this case, it is one in which promptness and actual good faith was required on both sides. It was required of Mr. Frost, if he did not intend to apply the money he received in payment of this premium to make the policy good, that he should give prompt notice. If he did give prompt notice, it was incumbent upon Mr. Nixon, or Mrs. Nixon, to act definitely in the matter of furnishing the additional certificates that were required, or notify him that they could not or would furnish them, and call for their money to be returned, and if they did not notify Mr. Frost, and ask for the return of the money, and it was yet retained by Mr. Frost, with the knowledge of his superior officers in the company, then it cannot be insisted that he was acting as Trustee or Agent of the plaintiff in holding the money, but it will be regarded as money received and retained by the company, and bind them to make an application of it as a payment in accordance with the original intention and instruction of the plaintiff in sending it.”

To which instruction and charge of the Court, the defendant then and there duly excepted, and exception allowed by the Court.

## XVIII.

The Court erred in charging and instructing the jury as follows, to-wit :

“ Now, it is for you to take into account the testimony, the letters and correspondence that has been introduced, and decide what effect to give to this evidence, to determine whether the company received this money or not, and whether it has retained it after it should have returned it, in case the company decided to receive it as payment; and as you decide that question, you will make up your verdict for or against the plaintiff.”

To which instruction and charge of the Court to the jury, the defendant then and there duly excepted, and exception allowed by the Court.

## XIX.

The Court erred in overruling defendant's motion for a new trial herein.

## XX.

The Court erred in rendering judgment herein, in favor of the plaintiff and against the defendant.

Wherefore, the defendant, The Pacific Life Insurance Company of California, prays the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, that the judgment of the said Circuit Court of the United States, District of Washington, Western Division may be reversed and held for naught, and that the said defendant may be restored to all things that it has lost by reason thereof.

DOOLITTLE & FOGG,

Attorneys for Defendant.

And afterwards, to-wit: On the 28th day of December, 1892, there was duly filed in said Court in said cause, The Petition of said Defendant for a Writ of Error, in the words and figures as follows, to-wit:—

*In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

*Defendant.*

To the Honorable C. H. Hanford, District Judge of the United States District Court for the District of Washington, sitting as Circuit Judge of the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

Now comes The Pacific Mutual Life Insurance Company of California, defendant in the above entitled cause, and represents and alleges, that on the 28th day of December, 1892, the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, made and entered a judgment in the above entitled cause in favor of the plaintiff, Cora E. Nixon, against this defendant, The Pacific Mutual Life Insurance Company of California, for the recovery of the sum of ten thousand dollars and interest and the costs of said action.

And your petitioner further represents and alleges, that there is manifest error in the record and proceedings of

the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, in the following particulars, to-wit :

### I.

The Court erred in admitting evidence the policies of insurance in this case, for the reason that the contract of insurance herein sued on was in two parts, neither of which disclosed the entire contract, but both parties are required to show the entire contract.

### II.

The Court erred in not sustaining defendant's motion for a non-suit made at the close of the plaintiff's evidence, for the reason that there was no evidence then in the record upon which the jury could find a verdict for plaintiff.

### III.

The Court erred in sustaining objections to the questions propounded to the witness for the defendant, William M. Fleming, as to a conversation between him and Thomas Lea Nixon.

### IV.

The Court erred in refusing to permit the defendant to prove by said witness, that within thirty days after the premium fell due, within the days of grace allowed, the witness, then an agent of the company, called on Mr. Nixon and had a conference with him at his office, in which Mr. Nixon stated that he did not intend to pay the premium, but proposed to let the policy lapse.



## V.

The Court erred in permitting plaintiff's counsel to introduce in evidence the alleged letter of date October 23, 1890, purported to have been written by Edward C. Frost to Thomas Lea Nixon, for the reason that the same was in no wise identified, and on the contrary was in all respects expressly repudiated by the said Edward C. Frost, the person who purported to have written the same.

## VI.

The Court erred in permitting plaintiff's counsel to make statements in his closing argument to the Jury, not warranted by the evidence and calculated to prejudice and inflame the minds of the jury against the defendant, and to appeal to the sympathy of the jury on behalf of the plaintiff, which remarks were calculated to and did prevent defendant from having a fair trial.

## VII.

The Court erred in refusing to give to the Jury the following instructions as prayed for by defendant :

“ The application for insurance was written and signed in this State, and was made by Thomas Lea Nixon, dated August 15, 1889, and provided that the policy, if one should be issued thereon, should bear date on and run from the first day of September, 1889. This application was addressed to the defendant, The Pacific Mutual Life Insurance Company of California, a corporation organized and existing under the laws of the State of California, and having its principal place of business in San Fran-

cisco, in that State; and the application provided upon its face that if the proposition for Life Insurance therein contained should be accepted and a policy issued thereon, the contract of insurance should be held and construed at all times and places to have been made in the City of San Francisco, in the State of California. The application was accepted and the policy issued and made in San Francisco, in the State of California, and bore date September 1st, 1889, and by the terms of the contract itself, became and was a California contract, and the rights of the parties thereunder were governed by the terms of the contract and the laws of the State of California."

### VIII.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

"It was further provided in this application for insurance, and became a part of the contract, that all the declarations, agreements and warranties therein contained should constitute a part of the contract, and that the application with its declarations, agreements and warranties was offered as a consideration for the policy applied for, the policy itself expressing on its face that it was made in consideration of the representations made in the application therefor and the agreements therein contained, which application is made a part of the contract; and of said sum of five hundred seventeen and 80-100, and the annual payment of a like amount to be paid on or before 12 o'clock, noon, on the 1st day of September in every year during the continuance of the policy."

## IX.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

“ It is admitted that the contract of insurance was duly made and executed, containing all the provisions hereinbefore stated; that the first premium thereon was paid and the policy delivered, and the only issue in this case is, whether or not the second premium which fell due on the first day of September, 1890, was paid according to the terms of the policy or contract.”

## X.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

“ If you should find from the evidence that it was so paid, and that the insured, Thomas Lea Nixon, complied with the terms and conditions of the policy in that behalf on his part, then you will find for the plaintiff; but, on the other hand, if you find from the evidence that the premium which fell due on the first day of September, 1890, was not paid on or before 12 o'clock of that day, or within the thirty days grace, to wit: the next succeeding thirty days thereafter, according to the terms of the policy and within the lifetime of the insured, then it is your duty to find for the defendant.”

## XI.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

“ I charge you, that under the law of the contract, to wit: the Statutes of the Laws of California, the pro-

visions made in this contract for prompt payment of the premium when due was a warranty that the premium should be paid; and that a failure of this provision rendered the contract void under the Statutes of California, as well as under the provisions of its own terms found on its face. This provision was one which the parties had a right to make, and having made it, it became of the essence of the contract, and was binding upon the contracting parties and upon the beneficiary under the policy. The time within which the payment was to be made was also of the essence of the contract, and sickness and disability would not constitute an excuse for non-payment which operated to defeat the lapse of the policy, or prevent it becoming void for non-payment."

## XII.

The Court erred in refusing to give to the jury the following instruction, as prayed by the defendant:

"If there was a failure to pay the premium within the time fixed by the contract it defeats the plaintiff's right to recover in this action; the policy lapsed and became void by reason of that non-payment, and no promise of an agent to accept the premium after the time when it should have been so paid would operate to renew the policy, even the act of a person holding an agency of this plaintiff in receiving, receipting for and temporarily retaining the amount of the premium, past due, and for the non-payment of which the policy had lapsed by its own terms, would not operate as a waiver so as to renew the policy or entitle the plaintiff to recover thereon."

## XIII.

The Court erred in charging and instruction the jury as follows, to-wit :

“ And the only issue in this case is, as to whether or not the second premium, which fell due on the first day of September, 1890, was paid.”

And the Court further charged and instructed the jury:

“ She cannot hold this company liable, on any promise of an agent of the company, to accept anything except actual cash in full payment due, within the time stipulated in the contract, but under the issues as they are formed she must prove that she actually paid the money, and that the company got it.”

And the Court further charged and instructed the jury that “ under the terms of the contract and the law of the case, the time when the money was due is a material part of the contract, which the company had a right to insist upon, and no tender of payment or offer of payment after the lapse of the time, would place her in the same situation that actual payment would place her in, provided the tender was refused or not accepted.”

And, thereupon, the Court further instructed and charged the jury as follows: “ but an actual payment of the money, so that the full amount was received by the company when paid by the plaintiff in this cause, is a payment of that premium ; and if received and retained by the company, would be exactly equivalent to payment within the period provided in the contract when it should have been paid. On other words, a payment is as much a payment made after the date

when it was due and payable, provided it was received and retained by the company, as if it had been made before that time.”

To which charge of the Court to the jury, the defendant then and there duly excepted, and exception allowed by the Court.

#### XIV.

The Court erred in charging and instructing the jury as follows, to-wit :

“Now, Mr. Frost appears by the pleadings and the evidence to have been acting for this company, and whatever he did within the scope of his authority to represent the company, will be regarded as the act of the company. Acts of his unauthorized and outside of the scope of his authority as an agent of the company, are not binding upon the company, unless he assumed to act for the company and the company knew of his actions and received and retained the benefit of his action, and failed promptly to give notice to the plaintiff that his act was not indorsed or approved of by the company.”

To which ruling, the defendant then and there duly excepted, and exception allowed by the Court.

#### XV.

The Court erred in charging and instructing the jury as follows, to-wit :

“If he received money from the plaintiff for the company which he was not authorized at the time to receive, and yet retained it and applied it to the use of the company, with the knowledge of his superior officers in the company, and if they failed to notify the plaintiff that the

payment was not approved or received by the company, and failed to return the money, if they received it, then it would be by reason of the failure of the company to repudiate his act promptly, equivalent to an authorized act, and be regarded as the ratification of the action of the agent of the company in a matter in which he was previously unauthorized.”

To which charge of the Court to the said jury, the defendant then and there duly excepted, and exception allowed by the Court.

#### XVI.

The Court erred in charging and instructing the jury as follows: to-wit:

“ If the plaintiff sent the amount of the second premium on this policy to Mr. Frost at Portland, to be applied as a payment of the second premium on this life insurance policy, Mr. Frost would have no right to receive and retain the money for any other purpose than as a payment on the policy as the second premium, according to the instructions sent with the money. If, however, being unauthorized, he simply retained the money temporarily and promptly notified the plaintiff that it had not been applied in payment of the premium the company would not be bound by his act in receiving the money. If, however, he retained the money, after being requested, or notified by the plaintiff to return it, then his assumption in the matter of acting as trustee or agent of the plaintiff would be unwarranted, and as far as he was acting with the knowledge of the managing officers of the company, would be binding upon them in the same manner as where he acted for the company in any other respect.”

To which instruction and charge of the Court to the jury the defendant then and there duly excepted and exception allowed by the Court.

### XVII.

The Court erred in charging and instructing the jury as follows, to-wit: "Under the peculiar condition of this case, it is one in which promptness and actual good faith was required on both sides; it was required of Mr. Frost, if he did not intend to apply the money he received in payment of this premium to make the policy good, that he should give prompt notice. If he did give prompt notice it was incumbent upon Mr. Nixon or Mrs. Nixon, to act definitely in the matter of furnishing the additional certificates that were required or notify him that they could not or would not furnish them, and call for their money to be returned, and if they did not notify Mr. Frost and ask for the return of the money, and it was yet retained by Mr. Frost, with the knowledge of his superior officers in the company, then it cannot be insisted that he was acting as trustee or agent of the plaintiff and holding the money, but it will be regarded as money received and retained by the company and bind them to make an application of it as a payment in accordance with the original intention and instruction on the plaintiff in sending it."

To which instruction and charge of the Court the defendant then and there duly excepted, and exception allowed by the Court.



## XVIII.

The Court erred in charging and instructing the jury as follows, to-wit :

“ Now it is for you to take into account the testimony, the letters and correspondence, that has been introduced, and decide what effect to give to this evidence to determine whether the company received this money or not, and whether it has retained it after it should have returned it, in case the company decided to receive it as payment ; and as you decide that question you will make up your verdict for or against the plaintiff.”

To which instruction and charge of the Court to the jury the defendant then and there duly excepted, and exception allowed by the Court.

## XIX.

The Court erred in overruling defendant's motion for a new trial herein.

## XX.

The Court erred in rendering judgment herein, in favor of the plaintiff and against defendant.

All of which errors will more fully appear by the Assignment of Errors in the United States Circuit Court of Appeals, for the Ninth Circuit, which is filed herewith.

Wherefore, your petitioner prays, that a Writ of Error may be allowed to the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, whereby the said final judgment may be removed to the United States Circuit Court of Appeals, for the Ninth Circuit to be there

reviewed and corrected, and that a citation may be issued to the plaintiff, Cora E. Nixon, citing and admonishing her to be and appear before the United States Circuit Court of Appeals, to be holden at the City of San Francisco, in the State of California, within the time required by law and the rules of the said Court, there to show cause, if any there be, why the said judgment of the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, should not be corrected, and that the amount of the bond may be fixed, which will be necessary for your petitioner to give, in order that execution may be stayed on said judgment, and that said Writ of Error may be presented, and that such other proceedings may be allowed as will enable your petitioner to the review of the judgment rendered in the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, by the said United States Circuit Court of Appeals, for the Ninth Circuit, and that said alleged errors may be therein corrected.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

Petitioner.

By DOOLITTLE & FOGG,

Its Attorneys.

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And, afterwards to-wit: On the 28th day of December, 1892, there was duly filed in said Court in said cause, notice of the plaintiff withdrawing and revoking the stipulation entered into September, 28th, 1892, in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, District of  
Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA, (a corpor-  
ation),

*Defendant.*

To Messrs. Doolittle & Fogg and C. N. Fox, Attor-  
neys for the above named defendant.

You are hereby notified and advised that the consent and permission involved in the stipulation heretofore signed and filed in the above entitled cause, on the 28th day of September, 1892, to extend the time for making or taking exceptions to the charge of the Court or in any other act ruling or decision of the Court, at the trial of said cause, is hereby revoked and withdrawn, as is also the waiver of the terms of Rule 23 of this Court, touching the time when exceptions shall be made, and that we shall object to the saving of any and all exceptions, and their incorporation in the Bill of Exceptions that were not actually made at the trial, and before verdict.

RELFE & BRINKER and  
PALMER & CARROLL,

Attorneys for Plaintiff.

And afterwards, to-wit: on the 28th day of December, 1892, there was duly filed in said Court, in said cause, A Motion to Vacate and Set Aside the Order made October 3d, 1892, in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, District of  
Washington, Western Division.*

CORA E. NIXON

vs.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,  
(a corporation,)

Comes now the above named plaintiff by her attorneys, and moved the Court to amend and vacate so much of its order made and entered in said cause on the 3d day of October, 1892, as authorizes an extension of time for excepting to the charge of the Court to the jury, or any other exceptions which were not actually made at the trial and before verdict as shown by the record, the minutes of the Judge, the stenographer's notes, and papers then filed, for the reasons following :

First—That so much of the stipulation on which said order was made as gave consent to taking exceptions after verdict, and waived that portion of Rule 23 of this Court, was a mistake and was not so understood by the counsel for plaintiff who signed the stipulation, nor by defendant's attorneys.

Second—That said stipulation was signed by one of the attorneys for plaintiff hastily and without consulting with his associate counsel, and with their knowledge or consent, and that no more was intended by him than to extend the time for presenting, settling, and signing the bill of exceptions covering exceptions already made at

the trial and before verdict, as provided by the last sentence of Rule 23.

Third--That said stipulation was made and signed the next day after verdict, and therefore amounts merely to a consent, which stipulation and consent, so far as it authorized the making and taking or saving any exceptions after verdict has been withdrawn and revoked of which defendant's counsel have been duly notified.

RELFE & BRINKER,  
PALMER & CARROLL,  
Att'ys for Plaintiff.

Service and copy of above motion this day (December 28, 1892) admitted.

DOOLITTLE & FOGG,  
Att'ys for Deft.

And, afterwards, to wit: on Wednesday the 28th day of December, 1892, the same being the 32d judicial day of the regular July Term of said Court; present, the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

*In the Circuit Court of the United States, for the District of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA  
(a corporation),

*Defendant.*

**Judgment.**

Now, on this 28th day of December, 1892, come the parties to the above-entitled cause by their respective attorneys, and the motion of the plaintiff to have judgment rendered in her favor and against said defendant in conformity to the verdict of the jury heretofore rendered in this cause on the 28th day of September, 1892, as appears by the record herein, is submitted to the Court; and defendant's motion for a new trial herein having been this day denied, and it appearing to the satisfaction of the Court that the verdict as rendered by the jury as aforesaid was for the sum of \$10,997.40, the same being for the amount of the policy sued on, to wit: *interest* \$10,000.00 and interest, at the rate of seven per centum per annum to the said 28th day of September 1892; and it further appearing that three months have elapsed since the rendition of said verdict, and that the plaintiff is entitled to have interest at the rate aforesaid for said period, amounting to the sum of \$175.00 added to the amount of said verdict and incorporated in the judgment, making an aggregate sum of \$11,172.40.

It is therefore considered and adjudged by the Court

That the said plaintiff, Cora E. Nixon, do now have and recover of and from the said defendant, The Pacific Mutual Life Insurance Company of California, the said sum of eleven thousand one hundred and seventy-two dollars and forty-cents, together with her costs and disbursements by her in this action expended, to be taxed by the Clerk, and that execution issue to enforce this

judgment, to all which defendant except and exceptions allowed.

C. H. HANFORD,

Judge.

December 28th, 1892.

And, afterwards, to-wit, on the 30th day of December, 1892, there was duly filed in said Court in said cause, The Bond of the Defendant on Appeal, in the words and figures, as follows, to-wit:

*In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.*

CORA E. NIXON,

*Plaintiff,*

*vs.*

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

*Defendant.*

**Bond.**

Know all men by these presents, that The Pacific Mutual Life Insurance Company of California, by one of its attorneys, Charles S. Fogg, and T. B. Wallace and P. C. Kauffman of Pierce County, State of Washington, are held and firmly bound unto Cora E. Nixon, of Pierce County, State of Washington, in the sum of twenty-three thousand dollars, to be paid to the said Cora E. Nixon, her heirs, executors, or administrators for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated, this 29th day of December A. D. 1892.

Whereas, the above-named, the Pacific Mutual Life Insurance Company of California, by one of its attorneys, Charles S. Fogg, hath sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in the above-entitled action by the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, and desires a stay of proceedings on said judgment.

Now, therefore, the condition of this obligation is such that if the above bounden, The Pacific Mutual Life Insurance Company of California, shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

THE PACIFIC MUTUAL LIFE INSURANCE  
COMPANY OF CALIFORNIA,

(Seal)

By CHARLES S. FOGG,

One of its Attorneys.

(Seal)

T. B. WALLACE,

(Seal)

P. C. KAUFFMAN.

STATE OF WASHINGTON,

County of Pierce. } ss.

T. B. Wallace and P. C. Kauffman being first duly sworn, each for himself says, that he is over the age of twenty-one years, a citizen of the United States of America and a freeholder of Pierce County, Washing-



ton. That he is not an attorney-at-law nor an officer of this Court; that he is worth the amount specified in the foregoing bond, over and above all just debts and liabilities and exclusive of property exempt from execution.

T. B. WALLACE,  
P. C. KAUFFMAN.

Subscribed and sworn to before me this 29th day of December, A. D. 1892.

(Seal)

F. S. DENMAN,

Notary Public in and for the State of Washington,  
Residing at Tacoma, in said State.

Approved by me this 30th day of December, 1892.

C. H. HANFORD,  
U. S. District Judge, Presiding in said Circuit Court.

UNITED STATES OF AMERICA, SS.

*The President of the United States of America,*

To the Judges of the Circuit Court of the United States,  
for the District of Washington, Greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between Cora E. Nixon, Plaintiff, and The Pacific Mutual Life Insurance Company of California, Defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you

send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, within thirty days from the date of this writ to be there and then held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness,

(Seal.) The Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 28th day of December, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States, the one hundred and seventeenth.

The above Writ of Error is hereby allowed.

C. H. HANFORD,

District Judge presiding in said Circuit Court.

A. REEVES AYRES,

Clerk U. S. Circuit Court, Dist. Wash'n.

UNITED STATES MARSHAL'S OFFICE, }  
 District of Washington. } ss.

I, Thos. R. Brown, U. S. Marshal for the District of Washington, do hereby certify that I served the within Writ of Error on the within named Cora E. Nixon, at the County of Pierce, in the State of Washington, on the third day of January, A. D. 1893, by then and there delivering to

the said Cora E. Nixon, personally, a true and correct copy of the within Writ of Error, and that at the same time and place, I served the within Writ of Error on Leroy A. Palmer, one of the attorneys for the within named Cora E. Nixon, by then and there delivering to the said Leroy A. Palmer, personally, a true and correct copy of said Writ of Error.

THOS. R. BROWN,  
U. S. Marshal.  
By D. G. Lovell, Deputy.

Marshal's Fee, \$8.24.

UNITED STATES OF AMERICA, ss.

To Cora E. Nixon, Greeting :

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the District of Washington, Western Division, wherein The Pacific Mutual Life Insurance Company of California is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness,

(Seal.) The Honorable MELVILLE W. FULLER,  
Chief Justice of the Supreme Court of the United States,  
this 28th day of December, A. D. 1892, and of the Inde-

pendence of the United States, the one hundred and seventeenth.

C. H. HANFORD,

U. S. District Judge, presiding in said Circuit Court.

Attest: A. REEVES AYRES,

Clerk U. S. Circuit Court, Dist. Wash'n.

UNITED STATES MARSHAL'S OFFICE, }  
 District of Washington. } ss.

I, Thos. R. Brown, U. S. Marshal for the District of Washington, do hereby certify that I served the within citation on the within named Cora E. Nixon at the County of Pierce, in the State of Washington, on the third day of January, A. D. 1893, by then and there delivering to the said Cora E. Nixon, personally a true and correct copy of the within citation and that at the same time and place I served the within citation on Leroy A. Palmer, one of the attorneys for the within named Cora E. Nixon by then and there delivering to the said Leroy A. Palmer personally a true and correct copy of said citation.

THOS. R. BROWN,

U. S. Marshal,

By D. G. Lovell, Deputy.

Marshal's Fee \$8.24.

UNITED STATES OF AMERICA, }  
 District of Washington. } ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States of America for the District of Washington, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify that the foregoing pages, numbered from one hundred to one hundred and sixty-

five, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The Pacific Mutual Life Insurance Company of California, Plaintiff in Error, against Cora E. Nixon, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed at the City of Tacoma, in the District of Washington, this 24th day of January, in the year of our Lord, one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

(Seal)

A. REEVES AYERS,

Clerk.









